ZONING

BASSETT

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The Laws, Administration, and Court Decisions During the First Twenty Years

BY

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PREFACE

THE first edition of Zoning, published by the Russell Sage Foundation in 1936, has been sold out and, since there is considerable demand for it, a new printing is necessary. This affords the author an opportunity to make some improvements in fullness of citations, but, what is more important, it enables him to restate the principles of zoning for height, area, and use in the light of misunderstandings that have developed, and to analyze the progress during the last ten years of planning experiments, commonly called zoning.

The widespread approval by courts of zoning for height, area, and use has induced students to employ the word "zoning" to describe other forms of regulation, some of which have none of the essentials of zoning. So much has been written under this head and the word is used so often in colleges, as well as in legislatures, that it seems desirable to discover, if possible, which applications of the word are to zoning and which are not, also the kind of zoning that is lawful and the kind that is not.

The introduction contains such an analysis.

EDWARD M. BASSETT

January 1, 1940

PREFACE TO FIRST EDITION

THE purpose of the author in preparing this book was not only to bring together the court decisions on zoning but to outline the early development of zoning in this country. George McAneny and the author had been officially connected with the preparation of the dual subway plans in New York City. Both had worked in that city for several years to progress rapid transit for the prevention of congestion and the better distribution of residences, business, and industry. After the dual subway contracts were signed, a group interested in the better distribution of population conferred on the possibilities of supplementing the rapid transit plan by a system of regulatory laws that would prevent overbuilding at locations affording the best transit facilities. The view was expressed that if the new subways produced only increased congestion of living and business conditions they would be a doubtful benefit to the city. Under the leadership of Mr. McAneny the Board of Estimate and Apportionment appointed a commission in 1913 to study and propose regulations for limiting the height and size of buildings. The book containing the report of this Commission, called the Report of Heights of Buildings Commission, was printed by the city and resulted in the appointment by the Board of Estimate and Apportionment of a new commission on building districts to explore the possibilities of the regulation, under the police power, of the height, area, and use of buildings. Its report is called the Report of the Commission on Building Districts and Restrictions. These two reports were the foundation of the zoning plan of New York City.

The members of the two Commissions were Edward M. Bassett,[1] Edward C. Blum,[1] Edward W. Brown, William H. Chesebrough, James E. Clonin, William A. Cokeley, Otto M. Eidlitz,[1] Abram I. Elkus, Burt L. Fenner,[1] Edward R. Hardy, J. Monroe Hewlett, Robert W. Higbie, C. Grant La Farge, Richard W. Lawrence, Nelson P. Lewis, Alrick H. Man, Alfred E. Marling, George T. Mortimer,[1] Lawson Purdy,[1] Allan Robinson, August F. Schwarzler, J. F. Smith, Walter Stabler, Franklin S. Tomlin,[1] Lawrence Veiller, George C. Whipple, Gaylord S. White, and William G. Willcox.

[1] On both Commissions.

These two Commissions were fortunate in having the assistance of George B. Ford, John P. Fox, Herbert S. Swan, George W. Tuttle, Robert Whitten, and Frank B. Williams. The work demanded a wide knowledge of municipal engineering, architecture, law, and the history of building regulations. Skill was necessary in handling land and statistical problems and estimating trends of distribution of future residence, business, and industry.

After the zoning plan was adopted by New York City a citizens' committee, called the Zoning Committee of New York, was established to assist in the administration of the new law in New York City, and to help extend zoning throughout the country. It was feared that if this rather new invocation of the police power was employed in only one city courts would frown on it because of its limited use. The future of zoning was at that time precarious and it was considered that its extension to other cities would be an aid to securing the approval of courts. Judicial approval of extensions of the police power depends somewhat on a widespread opinion that such extensions are needed, and also upon their actual employment by governing bodies.

Fortunately other cities rapidly adopted the New York City method in whole or part. The zoning plan is now in operation in more than 1,200 municipalities in this country. The United States Department of Commerce prepared a form for a state enabling act, which was widely used by state legislatures.

The author has been counsel of the Zoning Committee of New York since its formation, was a member of the Advisory Committee on Zoning appointed by Herbert Hoover, Secretary of Commerce, and has had the privilege of visiting many states and cities for the purpose of helping the establishment of zoning.

The Zoning Committee of New York has kept files of all state enabling acts, local ordinances, and court decisions. The cases cited in this book are taken from such files. The author wishes to express his grateful appreciation to the Zoning Committee for the use of these files. He also acknowledges the indispensable assistance of Fred S. Hall, Elizabeth Wallace, and Katherine McNamara.

EDWARD M. BASSETT

July 25, 1936

INTRODUCTION

THIS book is confined to zoning for height, area, and use of buildings. Zoning merely means the division of land into districts having different regulations. But in the sense that the word is used in this book the regulations are imposed by law, and they must be reasonable; also they must have a substantial relation to the health, safety, comfort, and convenience of the community. Otherwise the regulations are void.

Land similarly situated must be zoned alike. Otherwise the regulations are discriminatory and void.

These requirements are so simple and self-evident that one wonders why comprehensive zoning did not begin in this country earlier. There is no doubt that the method of protection afforded by zoning was desired before 1916. In Chicago and St. Louis many of the streets in the exclusive residential neighborhoods were laid out and were usually approached through a handsome stone entrance way. They were given a name like Belmont Court. In several instances the help of the municipal council was obtained which imposed ordinances known as block ordinances, excluding every structure but high-class residences. One by one these ordinances were swept away by the courts because other land similarly situated was not regulated in the same way; in other words, the regulations were discriminatory and void. These well-known court decisions caused lawyers and legislators to consider in the early days that zoning was unlawful on account of its being unconstitutional.

Confronted by these adverse decisions pioneer zoners in the various states sought broad and safe fundamentals for their work. They urged that a state enabling act giving the specific power to municipalities be established before a municipality adopted an ordinance; that the entire municipality should be zoned; that the regulations should be reasonable and not discriminatory; and that these regulations should have a substantial relation to the health, safety, comfort, and convenience of the community. The result was that the New York Court of Appeals (Lincoln Trust Co. v. Williams

Bldg. Corp., 229 N. Y. 313, 128 N. E. 209, 1920) promptly declared that they would uphold such regulations. Since then all states have adopted zoning enabling acts and the courts in these states uphold these acts.

Zoning for height, area, and use began with cities and extended to villages, boroughs, and towns. The method was found to be fully as convenient for country districts as for city districts. In some states, especially in California, counties take the place of the towns and townships, which embrace the rural areas in the East. This form of zoning was found to be equally convenient when applied to an entire county. In the latter instance it has been called county zoning. Whether applied to cities or counties, it has been the same kind of zoning, namely, that for height, area, and use, and it has been upheld by the courts.

To repeat, discussion in this study relates exclusively to zoning for height, area, and use. The legislature of Wisconsin in 1929 passed an enabling act empowering counties to establish districts for forestry or recreation, from which agriculture can be excluded. Many Wisconsin counties have adopted ordinances pursuant to this enabling act and a few counties in various states have done the same. The method is to lay out districts unsuited to agriculture, from which new agriculture is excluded, the areas of prohibition being called either forestry or recreation districts. By preventing agriculture in these districts or zones the cost of roads, schools, and other scattered public improvements can be lessened without harm to the community; soil erosion due to premature and improper disturbance of ground can be prevented; forests can be preserved and utilized; and outdoor life, especially in summer, can be promoted. Existing homes are not ousted but bought, necessary buildings for camps can be erected, and hunting and fishing carried on. Private ownership will continue. The land is inexpensive. Owners desire light taxation. There will be some earnings from forestry, game, and campers.

By some this form of zoning has been called county zoning and by others rural. Both terms seem to be misnomers. All counties can be zoned by all zoning methods, present and future. The term "county zoning" is not differentiating. The term "rural" is equally misleading. Far more rural than urban land is covered by the

ordinary zoning for height, area, and use. "Submarginal farm zoning" is an accurate term. It has already been widely used and cannot be applied to other kinds of zoning.

The word "recreational" as used in the Wisconsin statute to describe one sort of district seems unfortunate. Land devoted to recreation is usually public land and is called park land. We have our national, state, and city parks. To call private land a recreational district is confusing. We suggest the term "non-usable" or "unbroken" land.

This submarginal farm form of zoning will probably meet with the favor of courts if the regulations are reasonable and not confiscatory. Lands of different characteristics are placed in different districts. The courts will probably decide that the regulations have a substantial relation to community health, safety, morals, convenience, and general welfare. Although the benefits of zoning are almost entirely economic, preservation of the soil, protection of the forests, and saving to the taxpayers of unnecessary expense would appear to bring this method of zoning within the protection of the police power.

For at least fifteen years there has been constant pressure for roadside zoning to prevent billboards, filling stations, and eating stands. It is not strange that many consider that such regulation is a field for zoning. People know that the usual zoning for height, area, and use, in residence districts, prevents billboard and other objectionable uses along the roadsides and that residence districts in zoned towns comprise more than nineteen-twentieths of the entire roadsides. They know, too, that many towns, especially those made up of farms, are not zoned, and they jump to the conclusion that there is no need of waiting for the entire town to adopt an ordinance; but, since they are interested in roadsides only, they advocate the establishment of zoned strips along the edges of roads which will prevent objectionable structures.

State legislatures seem to give almost no attention to roadside zoning. Plainly there must be some good reason. Many agricultural towns do not like zoning. Farmers are afraid that an effort will be made to regulate their crops. They dislike this kind of zoning as much as they do the usual comprehensive zoning of the entire terrain. Failing to interest the towns, advocates of roadside

zoning urge state legislatures to enact strip zoning regulations covering all roadsides in the state, forgetting that the state legislators come from towns that are largely against roadside zoning, and that the last thing such legislators care to do is to take the local decision away from the towns.

Zoning for height, area, and use has been upheld by the courts because it is comprehensive and not piecemeal. Legislators are likely at once to ask why the whole of a town should not be zoned instead of narrow strips along roads.

Then, too, it is well settled that a zoning plan consists in applying different regulations to different districts. Regulation without different kinds of districts may be within the police power, but it is not zoning. Accordingly we should speak of roadside regulation and not roadside zoning. States will undoubtedly find methods of regulating roadsides, partly for safety of traffic and partly for amenity. At present nearly all courts say no to esthetics. Massachusetts has made progress by charging license fees on billboards and signs. Billboards and signs along roadsides are an injury. The method of complete prevention is not clear at present. In the meantime the old-fashioned way of zoning an entire town, which is supported by the courts in all states, should be more and more employed. Comprehensive zoning ordinances should be adopted. In residence districts shown on the maps of such ordinances, billboards and signs are strictly excluded.

CHAPTER I

RELATION OF ZONING TO STATE CONSTITUTIONS

Power to Zone Must Come from State

MUNICIPALITIES must obtain their power from the state. Especially is this true of the power to zone because this is a power that has not been customarily exercised. In the early days of zoning many authorities were inclined to consider that zoning regulations were an unlawful invasion of property rights. Courts properly looked for some expression of the state legislature in the statutes, or of the people of the state in the state constitution, which would justify the adoption by the municipality of a zoning ordinance.[1] They were loath to uphold such ordinances unless there was a state enabling act for zoning.[2] The constitutions of some states, however, have given their municipalities rather specific powers to adopt regulations to secure the health, safety, morals, comfort, convenience, and general welfare of the community. Where a constitution grants this power as fully as it can be granted by the state legislature the municipality can proceed to adopt zoning regulations without waiting for the state legislature to pass a zoning enabling act. Thus what may be called the first use-zoning regulations in this country were established by Los Angeles, acting under the constitution of the state of California. There was no state enabling act for zoning. An ordinance divided the business sections of the city into seven industrial districts and declared the remainder to be a residence district. In the residence district laundries were excluded. This exclusion was upheld by the courts.[3] By another ordinance the city was divided into residence districts, from which the brick industry was excluded, and other districts in which such industry might be carried

[1] Clements v. McCabe, 210 Mich. 207, 177 N. W. 722 (1920)

[2] Md.—Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925)
Mich.—Clements v. McCabe, 210 Mich. 207, 177 N. W. 722 (1920)
Mo.—City of St. Louis v. Evraiff, 301 Mo. 231, 256 S. W. 489 (1923)
Tex.—Spann v. City of Dallas, 111 Tex. 350, 235 S. W. 513 (1921)

[3] Ex parte Quong Wo, 161 Cal. 220, 118 P. 714 (1911)

on. Under this provision an existing brick yard was ousted from the prohibited district. The court declared that the owners could continue to excavate the clay but they must take it elsewhere to be burned into bricks.[1] This retroactive form of zoning has not been employed to an appreciable extent in this country because when more comprehensive systems of regulation were discovered and adopted, it was deemed best to allow existing nonconforming buildings and uses to remain, on the ground that lawful investments should be protected.

Before the comprehensive zoning of New York City the legislature of Massachusetts passed a law applicable to Boston, establishing two kinds of height districts, one with an 80-foot height limit and the other with a 125-foot limit. It was held that this was lawful under the state constitution.[2] Later a comprehensive system of zoning for Boston was passed by the state legislature and is now in effect. Boston is the only city in this country zoned directly by the state legislature.

Home Rule Charters

State constitutions have sometimes empowered cities to adopt so-called home rule charters.[3] Under this permission the voters may insert broad powers in the charter and bestow on the local legislative body the authority to pass regulations based on the police power. In the ten years after 1916 a few cities considered that their home rule charters gave their local legislatures as full authority to employ the police power for zoning as they would have under specific zoning enabling acts passed by the state legislatures.[4] In some of these cases there was no lack of power in

[1] Hadacheck v. Sebastian. 165 Cal. 416, 132 P. 584, 239 U. S. 394, 36 S. Ct. 143 (1915)

[2] Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 214 U. S. 91, 29 S. Ct. 567 (1909)

[3] Cal.—Thille v. Board of Public Works of Los Angeles, 82 Cal. A. 187, 255 P. 294 (1927)
Colo.—Colby v. Board of Adjustment, 81 Colo. 344, 255 P. 443 (1927)
Mich.—Clements v. McCabe, 210 Mich. 207, 177 N. W. 722 (1920)
N. Y.—Home rule constitutional amendment, Article XII, adopted November 6, 1923, enacted by Chapter 363 of the Laws of 1924
Ohio—Bauman v. Underwood, 122 Oh. St. 269, 171 N. E. 336 (1930)
Wis.—Ekern v. City of Milwaukee, 190 Wis. 633, 209 N. W. 860 (1926)

[4] Md.—Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925)
Mo.—City of St. Louis v. Evraiff, 301 Mo. 231, 256 S. W. 489 (1923)

the city, but the courts were critical of what seemed to be an unusual application of the police power, which they considered to invade private property rights. When a city once took the position that it had a full right to adopt zoning regulations without going to the state legislature for authority, it was prone to continue one effort after another to adjust these regulations so as to satisfy the courts. The cities were, however, in the main unsuccessful.[1] Courts considered the regulations unreasonable. Years of time and prodigious efforts were lost in insisting on the validity of the home rule method instead of accepting the inevitable and procuring a permissive enabling act from the state legislature. Sometimes cities pursuing these fruitless efforts became convinced that the courts would not uphold zoning, regardless of whether it was undertaken under home rule provisions or under a state enabling act. However, after a state enabling act for zoning was obtained some cities passed new zoning ordinances and the courts almost uniformly upheld them.[2] In New Jersey, exceptionally, even after such an act was passed, the courts declared that zoning for use was an unreasonable exercise of the donated power.[3] For instance,

[1] Md.—Applestein v. Baltimore, 156 Md. 40, 143 A. 666 (1928)
Bauernschmidt v. Standard Oil Co., 153 Md. 647, 139 A. 531 (1927)
Mayor and City Council of Baltimore v. Rutherford, 145 Md. 363, 125 A. 725 (1924)
R. B. Const. Co. v. Jackson, 152 Md. 671, 137 A. 278 (1927)
Rutherford v. Mayor and City Council of Baltimore, City Court, Baltimore Daily Record, October 25, 1923, 145 Md. 363, 125 A. 725 (1924)
Tighe v. Osborne, 149 Md. 349, 131 A. 801 (1925); 150 Md. 452, 133 A. 465 (1926)
Minn.—Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017 (1916)
Mo.—Better Built Home & Mortgage Co. v. McKelvey, 301 Mo. 130, 256 S. W. 495 (1923)
Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404 (1923)
Penrose Inv. Co. v. McKelvey, 301 Mo. 1, 256 S. W. 474 (1923)

[2] Md.—Jack Lewis, Inc. v. Mayor and City Council of Baltimore, 164 Md. 146, 164 A. 220, 290 U. S. 585, 54 S. Ct. 56 (1933)
Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1933)
North Baltimore M. P. Church v. Board of Zoning Appeals, Baltimore City Court, Baltimore Daily Record, June 24, 1932, 164 Md. 487, 165 A. 703 (1933)
Mo.—Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S. W. 720 (1927)

[3] N. J.—Ignaciunas v. Town of Nutley, 99 N. J. L. 389, 125 A. 121 (1924)
Kantorowitz v. Bigelow, 102 N. J. L. 13, 130 A. 811 (1925)
Newman v. Scott, 5 N. J. Misc. 514, 137 A. 924 (1927)
Pfarr v. Schmidt, 4 N. J. Misc. 861, 134 A. 840 (1926)
West End Investment Co. v. Osterman, 5 N. J. Misc. 335, 136 A. 926 (1927)

Footnote continued on page 16.

they declared that the exclusion of stores from a residence district had no substantial relation to the community health, safety, morals, and general welfare. It was not until the constitution of the state was amended by a specific declaration in favor of the lawfulness of zoning that the courts of New Jersey upheld use zoning.

Cities having home rule charters gradually learned that the best way to place zoning ordinances on a safe and enduring basis was to obtain in advance a state enabling act for zoning.[1] As a legal proposition a home rule charter, wherein the city has been donated all the power of the state to employ the police power in ordinances, should be as firm a basis for zoning as a state zoning enabling act. Nevertheless, the presence in the latter of checks and precautions—like those requiring a preliminary report of the zoning commission, and a more than majority vote if there is filed a 20 percent protest against changes of the map—have seemed to cause courts to resolve the doubt in favor of the power of the municipality. Then, too, where there is no state enabling act for zoning there is no provision for a board of appeals having power to issue variance permits in exceptional cases. The lack of this ameliorating power has a tendency to cause courts to hold that zoning is a more extensive power than is granted in the home rule charter.

An amendment to the New York constitution passed in 1923 gave certain home rule powers to cities, but their exercise must

Footnote continued from page 15.

The Nutley case did not discourage the property owners of New Jersey from continuing their efforts to obtain protection through use zoning. These unsuccessful efforts are shown in separate reported cases all referring to the Nutley case in justification of non-recognition of use zoning. They number over two hundred separate court cases and constitute the largest number of cases in this country on a single zoning situation. All are not cited here because they are repetitive.

[1] Ark.—Arkansas State Highway Commission v. Anderson, 184 Ark. 763, 43 S. W. (2d) 356 (1931)
Fla.—Helseth v. DuBose, 99 Fla. 812, 128 S. 4 (1930)
Metropolis Pub. Co. v. City of Miami, 100 Fla. 784, 129 S. 913 (1930)
Shad v. Fowler, 90 Fla. 155, 105 S. 733 (1925)
Stephens v. City of Jacksonville, 103 Fla. 177, 137 S. 149 (1931)
Iowa—Downey v. Sioux City, 208 Iowa 1273, 227 N. W. 125 (1929)
Kan.—Julian v. Golden Rule Oil Co., 112 Kan. 671, 212 P. 884 (1923)
Ky.—Fowler v. Obier, 224 Ky. 742, 7 S. W. (2d) 219 (1928)
Mich.—Dawley v. Collingwood, 242 Mich. 247, 218 N. W. 766 (1928)
Mo.—Aufderheide v. Polar Wave Ice & Fuel Co., 319 Mo. 337, 4 S. W. (2d) 776 (1928)

be preceded by enactments by the state legislature.[1] Under this amendment and a succeeding enactment the zoning clauses of the charter of the City of New York have been amended by the municipal assembly. All of the original zoning provisions of the charter were placed there by the state legislature.

Constitutional Amendments for Zoning

Constitutional amendments for zoning should not be necessary. Courts recognize that the principles of the police power remain the same but that as time goes on, and enlarged needs of communities develop, the application of these principles may be enlarged. In the earlier days, when communities were sparsely populated with low buildings and had much open space, there was not the need for zoning regulations that arose after population increased. Density of housing, high office buildings, hotels, and apartment houses produced entirely new conditions. Courts have recognized the lawfulness of zoning regulations about as rapidly as organized communities have found them necessary.

If as each enlarged application of the principles of the police power becomes desirable a constitutional amendment must be adopted, a state constitution would become unnecessarily padded. In the early days of zoning most courts declared that if the zoning regulations were reasonable and substantially related to the community health, safety, morals, and general welfare, the court would uphold them.[2] Nevertheless it was deemed desirable to add a constitutional amendment for zoning in the state of Massachusetts.[3] As in other such constitutional amendments the zoning of buildings was authorized in Massachusetts but there was no mention of the zoning of land. In order to prevent many undesirable forms of business or industry on vacant land—as discussed on page 49—it is customary to exclude damaging open-air uses from

[1] See *ante*, page 14, note 3.

[2] U. S.—Village of Euclid (Ohio) v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926)
N. Y.—Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920)

[3] Mass.—The General Court shall have power to limit buildings according to their use or construction to specified districts of cities and towns.—Constitution of 1922, Article LX.
Opinion of Justices, 234 Mass. 597, 127 N. E. 525 (1920)

residence and business districts. The reason why vacant land is usually omitted from constitutional amendments, and the effect of the amendment limited to structures, is probably because there is danger that the agricultural population will vote against the amendment for fear that crops may be regulated. Zoning ordinances in Massachusetts regulate vacant land much the same as in states that have no constitutional amendments for zoning. This shows that even in states that have adopted such amendments zoning will be exercised under the recognized principles of the police power rather than under the amendment.

In addition to Massachusetts a few other states adopted constitutional amendments for zoning.[1] The one adopted by New Jersey,[2] after its courts had for several years refused to recognize customary use zoning, merely provided that thereafter zoning should be considered lawful. The courts of the state had repeatedly declared that they would uphold reasonable zoning, and that the reason why they did not uphold use zoning was because it was not reasonable. The constitutional amendment did not declare that use zoning should be considered reasonable. That

[1] Del.—The General Assembly may enact laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts, and regulating therein buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the state.—Constitution, Article Two, Section 25; Laws of 1929, Chapter 1, Section 25.

Ga.—The General Assembly of the State shall have authority to grant to the governing authorities of .... cities having a population of 25,000 or more inhabitants, according to the United States census of 1920, or any future census, authority to pass zoning and planning laws whereby such cities may be zoned or districted for various uses and other or different uses prohibited therein, and regulating the use for which said zones or districts may be set apart, and regulating the plans for development and improvement of real estate therein.—Constitution, Article 3, Section 7, Paragraph 25; Laws 1927, p. 127.

La.—All municipalities are authorized to zone their territory; to create residential, commercial and industrial districts, and to prohibit the establishment of places of business in residential districts.—Constitution of 1921, Article 14, Section 29.

[2] N. J.—The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the state. Such laws shall be subject to repeal or alteration by the Legislature.—Article IV, Section 6, Paragraph 5 of Constitution; also Laws of 1928, page 820.

would be tantamount to saying that unreasonable use zoning should hereafter be lawful. If such an amendment had been proposed, it would have failed to carry. Undoubtedly the New Jersey constitutional amendment means nothing more than that reasonable zoning should hereafter be considered lawful. Although this is what the courts formerly declared they would uphold, it would appear that the emphasis of popular approval for the constitutional amendment created a tendency on the part of the courts to uphold use zoning.

Amendments of state constitutions that attempt to justify zoning do not appear to affect the scope of zoning, except perhaps in New Jersey.[1] The New Jersey amendment does not specifically sanction the zoning of vacant land, and one court decision holds that therefore vacant land cannot in that state be zoned for use.[2]

[1] Ga.—Fauss v. McConnell, 172 Ga. 444, 157 S. E. 625 (1931)
Howden v. Mayor and Aldermen of Savannah, 172 Ga. 833, 159 S. E. 401 (1931)
McCord v. Ed Bond & Condon Co., 175 Ga. 667, 165 S. E. 590 (1932)
La.—Civello v. City of New Orleans, 154 La. 271, 97 S. 440 (1923)
Dema Realty Co. v. Jacoby, 168 La. 752, 123 S. 314 (1929)
Dema Realty Co. v. McDonald, 168 La. 172, 121 S. 613 (1929)
Dickason v. Harris, 158 La. 974, 105 S. 33 (1925)
Holcombe v. City of Lake Charles, 175 La. 803, 144 S. 502 (1932)
Manhein v. Harrison, 164 La. 564, 114 S. 159 (1927)
Palma v. City of New Orleans, 161 La. 1103, 109 S. 916 (1926)
Roberts v. City of New Orleans, 162 La. 202, 110 S. 201 (1926)
N. J.—Jannarone v. Board of Adjustment of Nutley, 9 N. J. Misc. 210, 153 A. 256 (1931)
Koplin v. Village of South Orange, 6 N. J. Misc. 489, 142 A. 235, 105 N. J. L. 492, 144 A. 920 (1929)
Lewis v. Board of Com'rs of Avon-by-the-Sea, 7 N. J. Misc. 27, 143 A. 865 (1928)
Mulcahy v. Pancoast, 6 N. J. Misc. 1003, 143 A. 925 (1928)

[2] N. J.—City of Newark v. Lippmen, 13 N. J. Misc. 248, 177 A. 556 (1935)
State v. Borough Garage, Inc., Recorder's Court, Borough of Glen Rock, December 10, 1930

CHAPTER II

STATE ENABLING ACTS FOR ZONING

The First Zoning Commission

AT THE time that zoning was introduced into the New York City charter the word "zoning" had not been applied to the regulation of buildings in this country. The first study that led up to this subject in New York City was made by the Commission on Heights of Buildings. This was an investigating body appointed by the Board of Estimate and Apportionment to discover the relation of skyscrapers to the safety and health of the community and to indicate what regulations, if any, could be lawfully adopted to bring improvement. At that time an office building or hotel, in any part of the city, could cover the entire lot, rise to any height whatever, and maintain the lot size at the highest story. Darkened streets and buildings were found to result. There was no compulsory division of surrounding light and air at the upper stories. Remedies were proposed by the Commission which were carried out in the districting resolution adopted later. The Commission recommended in its report that not only height should be regulated, but that area and use were also in need of regulation in the interest of public health and safety. It was proposed that different regulations should be established for height, area, and use, according to the varying needs of the districts.[1]

On the filing of this report a bill, prepared by the Commission, was presented to the state legislature by the city administration. This bill amended the city charter by introducing districting provisions, and gave the Board of Estimate and Apportionment the power to appoint a districting commission to prepare a resolution and map. The bill was passed April 20, 1914. The new Commission held many hearings, both in the Municipal Building and in the different boroughs of the city. The demand for reasonable

[1] Report of Heights of Buildings Commission [New York City], December 23, 1913

regulations to prevent the increase of chaotic conditions was almost universal. The districting resolution was passed by the Board of Estimate and Apportionment July 25, 1916, and has been in operation ever since.[1]

The subject was for several years called "districting." However, the word "zoning" soon caught the popular fancy, and by common consent the older term has been dropped in ordinary parlance, the word "zoning" taking its place throughout the country. A zone is a belt. Walled cities in Germany and Austria were usually circular in form. After the walls had become obsolete circular parks and boulevards were laid out where the walls had been taken down. Outside of the circular boulevard or park system there was a belt or zone of apartment houses and still further out a belt of detached one-family houses. The word zone was commonly used in European countries to designate these districts, and suitable building regulations were imposed which were adapted to the needs of each zone.

Investigations in European Countries

The Commission that framed the New York City charter amendment and the building zone resolution made a careful study of building regulations in European countries, sending investigators abroad for this purpose. It was hoped that the foreign experience would be of great aid in establishing similar regulations in this country, but these expectations were not fully realized. Building departments in European cities, without depending on any basic laws which laid down general rules, could insist on different designs of buildings for different districts. The result was that investigators expecting to find laws and maps controlling zoning in the cities visited found instead that the building departments, under general authority to make regulations, had made different regulations for different areas. Much of this zoning work was excellently done, after systematic and broad-gauge study. But it was soon discovered that the European precedents were not of material aid in this country, where courts could declare void the doings of state or municipal legislatures that imposed unreasonable

[1] Final Report of Commission on Building Districts and Restrictions [New York City], June 2, 1916

regulations on private property. In other words, the doings of every state or local legislature in this country were subject to the protective safeguards of written constitutions, and the courts could declare what was constitutional and what was not. On this account it was necessary here to build up a statutory structure for zoning that would comply with the principles of the police power.

Early Incomplete Zoning

It cannot be said that the first zoning in this country was in New York City. In many cities fire districts had been established, wooden buildings being permitted in some of these and prohibited in others. They were not usually created by reason of a state enabling act relating to fire districts, but they seem to have grown up as part of the implied legislative powers of a municipality.[1] Fire districts, however, were a true form of zoning because different districts were governed by different regulations. In California, without any state enabling act for zoning, districts were established in Los Angeles where certain buildings and uses were prohibited.[2] The state legislature of Massachusetts prescribed for Boston different allowable heights for buildings fronting on certain streets.

[1] Fire districts were upheld before the days of zoning. The establishment of such districts for lessening the fire risk was deemed to be within the inherent powers of the municipality.
Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. S. R. 368
Monticello v. Bates, 169 Ky. 258, 183 S. W. 555
Monroe v. Hoffman, 29 La. Ann. 651, 29 Am. R. 345
Wadleigh v. Gilman, 12 Me. 403, 28 Am. D. 188
Brady v. Northwestern Ins. Co., 11 Mich. 425
Harris v. Poulton, 99 W. Va. 20, 127 S. E. 647

These municipal powers, however other decisions hold, usually exist by reason of an express grant or necessarily implied statutory or constitutional delegation.
Ex p. Lacey, 108 Cal. 326, 41 P. 411, 49 Am. S. R. 93
Pratt v. Litchfield, 62 Conn. 112, 25 A. 461
Beem v. Davis, 31 Ida. 730, 175 P. 959
Klever Shampay Karpet Kleaners v. Chicago, 323 Ill. 368, 154 N. E. 131
Mt. Vernon First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. S. R. 185
Des Moines v. Gilchrist, 67 Iowa 210, 25 N. W. 136, 56 Am. R. 341
Goldstein v. Conner, 212 Mass. 57, 98 N. E. 701
Eichenlaub v. St. Joseph, 113 Mo. 395, 21 S. W. 8, 8 L. R. A. 590
Pye v. Peterson, 45 Tex. 312, 23 Am. R. 608
Charleston v. Reed, 27 W. Va. 681, 55 Am. R. 336

[2] Ex parte Quong Wo, 161 Cal. 220, 118 P. 714 (1911)
Hadacheck v. Sebastian, 165 Cal. 416, 132 P. 584, 239 U. S. 394, 36 S. Ct. 143 (1915)

A height of 125 feet was allowed on specified fairly-wide central streets and 80 feet on all other streets.[1] This height regulation in Boston and the use regulation in Los Angeles were not called zoning, but they preceded the zoning of New York City. It may fairly be said, however, that the zoning enabling act embodied in the New York City charter and the building zone resolution of that city constituted the first comprehensive zoning of height, area, and use in this country.

Reasons for Zoning in New York City

It will not be out of place at this time to trace the reasons that prompted New York City to investigate the possibilities of employing the police power for the regulation of buildings and their uses in different parts of the city. Privately-owned elevated railroads and the original municipally-owned and privately-operated subway systems performed a highly useful function in distributing the population of the city. Nevertheless the conformation of Manhattan island tended to produce buildings of great height and to cause congestion of housing and street traffic. The continued growth of the city made necessary more bridges and tunnels over and under the East River and Hudson River in order that the city might assume the round form which is most economic for a great city. A round city affords the greatest area with the shortest distances to the center, whereas a long city affords the smallest area with the longest distances to the center. In order to bring about still greater distribution the so-called dual subway system was planned and its construction begun. Soon after the first construction contracts for this new system were let a demand arose that something should be done, if possible, to control the height of new buildings and the division of light and air at levels high above the streets. Experience had shown that subways tended to increase congestion. The most accessible spots were overbuilt. There was danger that the subways would greatly increase congestion at the same time that they afforded greater distribution in the outlying parts of the city. Some cities in this country had laws limiting the height of buildings, but there were no such laws in New York City. A building could legally rise to any height what-

[1] Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 214 U. S. 91, 29 S. Ct. 567 (1909)

ever, assume any form, be put to any use, and cover 100 percent of the lot from the ground to the sky. Tenement houses were the only structures that might not cover the whole lot. High office buildings not only covered their entire lots and had the same floor space in their top stories and their first stories, but cornices projected into the street from eight to fourteen feet. Buildings of this sort in the southern part of Manhattan made dark canyons of narrow streets, but what was perhaps even more harmful they produced chaotic building conditions. The first skyscraper to be erected in a block would cover the entire lot up to the roof and open its windows on neighboring lots. A high building so erected prevented other similar buildings from being constructed in its immediate vicinity. The reason for this was that the desired building would have no light on the side toward the existing high building. Moreover, if the first builder set his structure back from the lot line in order to have open space on which to front his windows, the builder on the next adjoining lot would front his windows on such open space. In other words, where the building on each lot could legally cover the entire space, the first builder obtained a virtual monopoly of the light and air.

It became apparent that the remedy was not merely a limitation of height but also the setting back of the upper parts of high buildings so that each owner would divide the light and air with his neighbor.

These investigations, and the rules growing out of them, resulted in the pyramid buildings of Manhattan which have so completely altered the skyline of the lower and central parts of that borough. Perhaps it cannot be said that the tendency for buildings of great capacity near the best subway service has been materially checked, but the creation of canyon streets has been stopped and the supply of light and air to upper stories has been increased.

The study of building height proved that prevention of chaotic conditions required much more than height regulations. The commission reported in favor of regulations of bulk and use in different districts of the city. Congestion may be lessened fully as much by regulations calling for yards and courts as by regulations of height. This field is usually called area or bulk.

During the preparatory work in New York City some critics

asserted that if zoning regulations were minimum standards of health and safety it was illogical to have different standards of height and area in different parts of the city. The argument prevailed, however, that greater density always has existed and probably always will exist in the centers of a city where the need for speedy transaction of business causes people to be near together. Many workers desire to live near their work and avoid the expense of daily travel. On the other hand, suburban localities supply places for more roomy homes, where the supply of light and air is ample and space is not expensive. All these considerations of health and safety were held to justify making different standards of height and area at different distances from urban centers. Courts have never found any fault with this view.

It also became evident that improper uses caused injury to homogeneous areas and were especially productive of premature depreciation of settled localities. One-family, detached-home districts, possessing trees and lawns, were invaded by apartment houses occupying nearly their entire lots. These in turn were damaged by the building of stores, garages, and factories. Localities of one-family detached homes and apartment houses were invaded by sporadic stores that sought to short-circuit the neighborhoods by utilizing eligible corners among the residences. Soon other stores were built on the opposite corners, and before long the nearby residences began to depreciate. Stores were built with windows on the property line, thus cutting off the continuation of front yards on the remainder of the street.

Invasion of apartment houses by stores on their ground floors lessened the desirability of neighboring apartment houses because of the increase of noise, vehicles, fire hazard, litter, and street congestion. Business streets lined with retail stores were invaded by factories, garages, and junk shops. Localities devoted to light industry, perhaps employing women and children, were invaded by heavy industries producing noise, smoke, and fumes. No landowner in any part of the city could erect a building of any sort with assurance that in ten or twenty years the building would not be obsolete by reason of an unnecessary and undesirable change in the character of the neighborhood. Sometimes these changes left a blighted district behind. It became apparent that regulations

might be adopted that would tend to stabilize some localities for one-family, detached homes, others for apartment houses free from stores and factories, others for stores and offices, others for light industry, and others for heavy industry. Thus it came about that the new zoning clauses of the charter provided for the preparation and adoption of regulations affecting height, area, and use of buildings, and the use of land.

Different Regulations in Different Districts

The novel feature of zoning as distinguished from building code regulations, tenement house laws, and factory laws was that suitable regulations for different districts were established. We have become so accustomed to zoning regulations that it is difficult to understand how fixed the popular notion was that all land should be regulated in the same way throughout a municipality. On this account imposing different regulations on different areas appeared to many to be discriminatory, arbitrary, and therefore an unlawful invasion of private rights. To counteract this impression it was considered important that the regulations within each district should be uniform for the same kind or class of buildings. A provision to this effect was placed in the original zoning clauses of the charter of New York City, and there can be no doubt that courts which early passed upon these regulations were to a considerable extent persuaded to favor them on account of this requirement of uniformity. If it had been possible to make different regulations for the same sort of buildings in different parts of the same district, it is unlikely that zoning would have received the court approval that it now has.

Police Power vs. Eminent Domain

The preparatory work for the zoning of New York City covered the subject of zoning by eminent domain. As there had been no comprehensive zoning regulations in this country, it was not yet determined whether they could be established under the principles of the police power or whether the exercise of eminent domain would be necessary. Many eminent lawyers declared that zoning as proposed was a taking of property and not merely a reasonable

regulation, and that inasmuch as private property could not be taken for a public use without payment, zoning under the police power would be declared unconstitutional. The New York City charter provisions proceeded, however, under the principles of the police power. No effective zoning plan could be accomplished by the exercise of eminent domain. If there were some diminution of the full use of property, the city would need to pay the loss to the private owner. This would mean a laborious and expensive proceeding for almost every parcel of land. Since the city could not afford to pay this cost out of public funds, but would need to assess the awards on the property benefited, the cost of the process would be enormous. The restrictions would consist of public easements of a permanent nature. But as every living organism grows and changes, these easements would have to be changed from time to time by successive applications of condemnation. The method would be clumsy and ineffective. Some states in their zoning enabling acts have tried to provide for the employment of eminent domain in whole or part,[1] but the attempts have never been successful. Regulation under the police power adapts itself easily to the growth and change of the municipality. If the regulation is so arbitrary that it amounts to a taking of property, the courts will pronounce it void. Efforts to frame enabling acts so that in such cases damages shall be awarded, have caused confusion.[2]

The Development and Spread of State Enabling Acts

The state legislature is the repository of the police power. The enabling act for zoning is the grant of this power to municipalities for regulating the height, area, and use of buildings, and the use of land. In the exercise of this grant the regulations must be reasonable and not arbitrary or discriminatory. They must have a substantial relation to the health, safety, morals, comfort, convenience,

[1] Kan.—City of Wichita v. Ware, District Court, 18th Judicial District, Division No. 2, July 10, 1922, 113 Kan. 153, 214 P. 99 (1923)
Minn.—Banner Grain Co. v. Houghton, 142 Minn. 28, 170 N. W. 853 (1919)
Madsen v. Houghton, 182 Minn. 77, 233 N.W. 831 (1930)
Mo.—Better Built Home & Mortgage Co. v. Davis, 302 Mo. 307, 259 S. W. 80 (1924)
Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404 (1923)
Wis.—Carter v. Harper, 182 Wis. 148, 196 N. W. 451 (1923)

[2] Pera v. Village of Shorewood, 176 Wis. 261, 186 N. W. 623 (1922)

and welfare of the community.[1] Inasmuch as they have an intimate effect upon land they should be framed so far as possible with the knowledge and coöperation of the landowners. The enabling act requires preparatory procedure to make sure that the system is worked out as a coördinated whole. This involves the appointment of a zoning commission to prepare the proposed ordinance and zoning map, the making of a preliminary report to the local legislative body, the holding of preliminary hearings thereon, and the holding of a public hearing by the legislative body. The ordinary state enabling act provides checks and precautions to prevent hasty and impulsive changes. It also provides for a board of appeals with authority to make variances by granting special permits in exceptional cases.

In the years immediately after 1916, when the building zone resolution of New York City was established, several state legislatures passed enabling acts for zoning. During that period it was found that in addition to its regulation of height, area, and use zoning should be applied to another field—the density of population. Cities often desired to prevent multiple dwellings accommodating more than a limited number of families per acre. The same method was sometimes expressed in another way—by requiring a certain number of square feet of lot for each family. Advocates of the earliest ordinances of this type attempted to justify them as a regulation of area. The difficulty was that there was nothing to control the crowding of a large number of families into a building that complied with all the area requirements, i.e., those of courts and yards. The courts pointed out that the regulation of density of population required an added grant of power from the state legislature to the municipality.[2] The result was that the field of density of population was included in new enabling acts, and some of the old ones were amended.

About this time Herbert Hoover, then Secretary of Commerce,

[1] U. S.—Village of Euclid (Ohio) v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926)
Nectow v. City of Cambridge (Mass.), 277 U. S. 183, 48 S. Ct. 447 (1928)
N. Y.—Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N. Y. S. 178, affd. 261 N. Y. 506, 185 N. E. 714 (1933)
Moss v. Rubenstein, 117 Misc. 385, 191 N. Y. S. 496 (1921)

[2] Barker v. Switzer, 209 App. Div. 151, 205 N. Y. S. 108 (1924)

appointed an Advisory Committee on Zoning. The government printing office had expended a great deal of money for disseminating information about good methods for agriculture, forestry, mining, and fisheries, but practically nothing had been done through the federal government to assist in bringing about economical building methods in cities. The new Committee, with a staff furnished by the Department of Commerce, investigated the possibilities of somewhat uniform methods of establishing zoning ordinances throughout the country. A standard form of state enabling act for zoning was prepared and furnished to all legislatures and municipalities. This form was adopted in whole or part by many states and has been one of the causes for the spread of zoning throughout the states.[1]

It has been found that a single state enabling act for zoning can apply to all the municipalities in a state—large cities as well as townships composed chiefly of farms. The comprehensive act of New Jersey is a good illustration of this statement. Some states, however, like New York and Pennsylvania, have separate enabling acts for different kinds of municipalities. Connecticut has many special enabling acts as well as a general act. Florida has no general act but many special acts.

What Land Can Be Zoned

The usual enabling act does not state what land can be zoned. This omission is probably prudent because any statement would be misleading or incomplete. It has been said that zoning refers to privately-owned land. It is evident that this cannot be the case because sites for public buildings are always zoned. A more accurate statement is that only land available for buildings can be zoned. The first zoning map—that of New York City—placed height and area regulations on all land except streets, and the use map covered all land except streets and parks. Streets are omitted because they are not available for building. Street land is held by the municipality in trust for the people of the state for movement, and neither the municipality nor a private person has the right to

[1] Advisory Committee on Zoning, United States Department of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations, Revised Edition, 1926

place a building on it. The law itself restricts the type of buildings that can be erected in a public park. They must be recreational or incidental to the administration or upkeep of the park. No grant of power in the zoning enabling act can increase or diminish these purposes.

The zoning map of New York City shows many streets that are on the official map but not yet opened. In a sense these are not public streets and the area is therefore available for building. If, however, the owner applies for a permit for a building in the bed of a mapped street it will be refused unless the proposed building corresponds to those allowable on the adjacent land.

Land under water may be used for building purposes and can therefore be zoned.[1] Even if its title is in the state or municipality the land can be zoned so far as the jurisdiction of the local legislative body extends. A barge on which industry is carried on, anchored in navigable water off a residence district, can be prohibited if the land under water is in a residence district. Accordingly, many cities have zoned land under water, whether navigable or not and regardless of whether private land titles extend to the middle or to the edge of the stream. In Jamestown, N. Y., a permit for a store was issued where the land under water was in a business district and the stream under the proposed building was declared in early state grants to be navigable water. In Rochester, N. Y., the land under the Genesee River is zoned. Stores built on the bridge over this river are treated like those over solid land, so far as zoning is concerned.

Railroad rights of way or railroad lands may be built upon and should be zoned for height, area, and use. The railroad company is likely to continue the railroad use, but there is nothing to prevent the sale of the land. A sale often occurs after a straightening of tracks or change of grade. If care has not been taken to zone this land, the purchaser may quickly erect a nonconforming building that will injure the neighborhood.[2]

[1] Wynn v. Margate City, 9 N. J. Misc. 1324, 157 A. 565 (1931)

[2] N. Y.—Actlaw Realty Corp. v. Wilkus, Supreme Court, Queens County, New York Law Journal, June 17, 1926, affd. 220 App. Div. 720, 221 N. Y. S. 783 (1927)
Joleto Construction Corp. v. Walsh, 223 App. Div. 764, 228 N. Y. S. 282 (1928)
Okl.—McCurley v. City of El Reno, 138 Okl. 92, 280 P. 467 (1929)

Public Buildings

Municipal and state officials usually comply with zoning requirements as a matter of comity. It is often said that officials should be the first to comply with their own regulations. The question occasionally arises, however, whether the zoning regulations can prevent a public building which is deemed necessary by the department having authority over a given field of public administration. For instance, the town authorities may lay out residence districts on the map and exclude fire houses. The fire district authorities may insist that adequate fire protection demands a fire house in the residence district. The need of a public building in a certain location ought to be determined by the federal, state, or municipal authority, and its determination on the question of necessary or desirable location cannot be interfered with by a local zoning ordinance. However, this recognition of the public need would not extend to matters that are in no way necessary.[1] For instance, a fire house might be necessary in a particular residential locality but no reason based on necessity might exist to prevent compliance with regulations regarding height and yards.

Enabling Acts Permissive Only

No municipality is compelled by law to enter into zoning. The state enabling acts are permissive only. But if a municipality decides to zone it must follow the procedure given in the state act; otherwise its ordinance will be null and void. The scope of the

[1] Cal.—Kubach Co. v. McGuire, 199 Cal. 215, 248 P. 676 (1926)
Fla.—Helseth v. Du Bose, 99 Fla. 812, 128 S. 4 (1930)
Kan.—Puhr v. Kansas City, 142 Kan. 704, 51 P. (2d) 911 (1935). A water tower in a residence district is lawful.
Md.—Mayor and City Council of Baltimore v. Linthicum, 183 A. 531 (1936)
N. Y.—Brocoris Realty Corp. v. Village of Scarsdale, 241 App. Div. 735, 269 N. Y. S. 746 (1934)
Village of Larchmont v. Town of Mamaroneck, 239 N. Y. 551, 147 N. E. 191 (1924)
O'Brien v. Town of Greenburgh, Supreme Court, Westchester County, Westchester Law Journal, January 31, 1933, 239 App. Div. 555, 268 N. Y. S. 173, affd. 266 N. Y. 582, 195 N. E. 210 (1935). The court here distinguishes a garbage reduction plant built by the town in its corporate and not governmental capacity.
People v. Siems, County Court, Nassau County, May 2, 1932. A fire district can locate and build a fire house in a residence district established by the town board.
Ohio—City of Cincinnati v. Wegehoft, 119 Oh. St. 136, 162 N. E. 389 (1928)

ordinance cannot be greater than the subjects of zoning stated in the enabling act. These usually are height, area, use, and density of population.[1]

Where the enabling act provides that the zoning regulations shall be established by resolution, it is dangerous to establish them by ordinance,[2] and vice versa.

Zoning Imposes No Encumbrance

A zoning regulation passed under the usual state enabling act does not impose an encumbrance on land.[3] If valid, it must be a reasonable police power regulation; if not valid, it cannot be enforced. All owners hold their land subject to the police power regulations of the community, whether for health, fire protection, or structural safety. These regulations are not found in the official land records, but all persons are presumed to know the law. It is always a mistake to require zoning ordinances to be recorded in land record offices. They can be consulted at the office of the municipal clerk the same as other ordinances.

Although a contract vendee of land cannot refuse to take title on the ground that unexpected zoning regulations are in force, a lessee need not go into possession under his lease if it would violate the zoning regulations and if the circumstances show that

[1] Chaotic conditions existing where there is no zoning or imperfect zoning are illustrated in these cases:
Conn.—Town of Madison v. Kimberly, 118 Conn. 6, 169 A. 909 (1934)
Minn.—Roerig v. City of Minneapolis, 136 Minn. 479, 162 N. W. 477 (1917)
Tex.—Ikard v. City of Henrietta, 33 S. W. (2d) 578 (1930)
City of San Antonio v. Robert Thompson & Co., 30 S. W. (2d) 339 (1930)

[2] City of Brookings v. Martinson, 61 S. D. 168, 246 N. W. 916 (1933)

[3] Ill.—Binder v. Hejhal, 347 Ill. 11, 178 N. E. 901 (1931)
Kazwell v. Reynolds, 250 Ill. A. 174 (1928)
Mass.—Siegemund v. Building Com'r of Boston, 259 Mass. 329, 156 N. E. 852 (1927), 263 Mass. 212, 160 N. E. 795 (1928)
N. Y.—Anderson v. Steinway & Sons, 178 App. Div. 507, 165 N. Y. S. 608, 221 N. Y. 639, 117 N. E. 575 (1917)
Biggs v. Steinway & Sons, 229 N. Y. 320, 128 N. E. 211 (1920)
Creighton v. Burns, Supreme Court, Kings County, New York Law Journal, October 9, 1925
Davis v. Philbert, Supreme Court, Kings County, New York Law Journal, April 16, 1925
Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920)
Moss v. Rubenstein, 117 Misc. 385, 191 N. Y. S. 496 (1921)
Wis.—Kend v. Crestwood Realty Co., 210 Wis. 239, 246 N. W. 311 (1933)

the lease is for the unlawful purpose.[1] A tenant cannot recover damages for breach of covenant of quiet enjoyment where both landlord and tenant assumed that the tenant could operate a tailor shop in a residential district.[2]

[1] N. Y.—Friedman Realty Co. v. De Stefan, 127 Misc. 608, 217 N. Y. S. 142, 220 App. Div. 661, 222 N. Y. S. 371 (1927)
Hartsin Construction Corp. v. Millhauser, 136 Misc. 646, 241 N. Y. S. 428 (1930)
Say-Phil Realty Corp. v. de Lignemare, 131 Misc. 827, 228 N. Y. S. 365 (1928)
Shontz Co. v. Laffay, 225 App. Div. 263, 232 N. Y. S. 614 (1929)

[2] N. Y.—Ober v. Metropolitan Life Insurance Company, 157 Misc. 869, 284 N. Y. S. 966 (1935)
Ober v. Metropolitan Life Insurance Company, 157 Misc. 872, 284 N. Y. S. 966 (1935)

CHAPTER III

THE ADOPTION AND AMENDMENT OF ZONING ORDINANCES

The Zoning Commission

THE state enabling act usually requires the appointment of a zoning commission before the original zoning ordinance can be established. This is a precautionary measure to make sure that the zoning shall not be adopted hurriedly or impulsively, but only after careful study and consultation with property owners. The number of members of the commission is not usually prescribed. It has been found that a zoning commission, by consulting with numerous property owners, can do much to allay opposition to a zoning plan and to insure popular confidence in it after its adoption. Nothing will produce greater hostility than an attempt at secrecy by the zoning commission. The property owner may be depended upon to know a great deal about his land and its probable future, and if he can be told about the protective features of zoning, his advice to the commission is always well worth considering. In the preparation of the New York City building zone resolution and map the zoning commission held separate conferences with representatives of various groups, such as builders, fire insurance men, savings banks, real estate developers, owners of high buildings, and factory owners. Subcommittees held conferences with interested property owners in the different boroughs of the city. One reason for the permanency and smooth operation of the New York City building zone resolution is that it copied no other zoning ordinance but was built up during several years by property owners who were in constant touch with the districting commission, directly and through their organizations. When it finally passed there was no opposition.

The commission should deliver to the local legislative body its preliminary report and draft of ordinance and map, and after hold-

ing a public hearing on them it should deliver to the same body its final report and draft of ordinance and map. Upon the adoption of the ordinance the zoning commission under the usual enabling act goes out of existence. After this the planning commission, if there is one, is usually the adviser of the local legislative body regarding amendments. It is a mistake to combine the two commissions, as is sometimes done, under the title of "zoning and planning commission." There is no objection, however, to the appointment of the same persons on each commission, unless there is a statutory provision to the contrary. Zoning is a part of the city plan, and as planning commissions become more numerous they will undoubtedly be substituted for the present temporary zoning commissions. But changes of the law in this respect, when deemed necessary, must be made in the state enabling act for zoning rather than by the municipality. In most states at present the zoning commission exists only to do the preparatory work on the original zoning ordinance. The planning commission is a continuing body. Consequently so long as the statute requires a zoning commission the two bodies cannot be safely coalesced. There should be two separate bodies, even if the individuals are the same on each, and separate minutes should be kept.

Sometimes local legislative bodies consider that the zoning commission should be made up entirely of their own members or subordinates subject to their direction. This is a mistake; not because it is unlawful but because a broader basis for the final ordinance is obtained by securing the outlook of private citizens in the first instance. The local legislators and their official advisers will have the final approval of the plan and all of its details. Thus the best judgment of well-informed men outside of official circles is obtained first, and later the criticism and constructive additions of officials. Then, too, the arrangement of the original boundary lines between districts is often a difficult matter and arouses emphatic differences of opinion among property owners. It is wise for members of the local legislative body to have no part in making the tentative determination of these boundaries. They cannot then be considered prejudiced listeners when they sit as legislators at the subsequent public hearing at which the facts and arguments on both sides are presented, for the zoning commission com-

posed largely or entirely of persons holding no other office will have constructed and submitted the plan.

The zoning commission is not needed for amendments made after the original zoning is adopted. The local legislative body may originate a proposed change, or petitions may be received from interested property owners.[1] Advertising and holding a hearing are necessary regardless of the origin of the proceeding. In case of amendments, reports are usually had from the planning commission or the city engineer.

Advertisement and Hearings

Observation of the precautions and safeguards provided in the enabling act for the original adoption of the zoning ordinance and for its amendment is considered by the courts to be vital. Omission of the zoning commission, or its preliminary report, or its hearing thereon, or its final report, or the advertising of a public hearing before the local legislative body, or the holding of such hearing will invalidate the ordinance.[2] Statutory requirements must be

[1] Marculescu v. City Planning Commission of San Francisco, 7 Cal. A. (2d) 371, 46 P. (2d) 308 (1935)

[2] Cal.—Berrata v. Sales, 82 Cal. A. 324, 255 P. 538 (1927)
Dwyer v. City Council of Berkeley, 200 Cal. 505, 253 P. 932 (1927)
Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929): "While the detriment flowing from a validly enacted zoning measure would be damnum absque injuria, the requirement of notice and hearing provided by the statute may not be treated lightly or at all disregarded. When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes quasi judicial in character, and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with."
Schofield v. City of Los Angeles, 120 Cal. A. 240, 7 P. (2d) 1076 (1932)
D. C.—Larrabee v. Bell, 56 App. D. C. 121, 10 F. (2d) 986 (1926)
Ga.—Jennings v. Suggs, 180 Ga. 141, 178 S. E. 282 (1935): "May" publish notice of hearing before making amendment construed to mean "must." Amendment declared invalid.
Ill.—Cain v. Lyddon, 343 Ill. 217, 175 N. E. 391 (1931)
Kan.—Armourdale State Bank v. Kansas City, 131 Kan. 419, 292 P. 745 (1930)
Ford v. City of Hutchinson, 140 Kan. 307, 37 P. (2d) 39 (1934)
Simmonds v. Meyn, 134 Kan. 419, 7 P. (2d) 506 (1932)
La.—Holcombe v. City of Lake Charles, 175 La. 803, 144 S. 502 (1932)
Mass.—Roman Catholic Archbishop v. Board of Appeal of Boston, 268 Mass. 416, 167 N. E. 672 (1929)
N. J.—Grantwood Lumber Co. v. Schweitzer, 7 N. J. Misc. 1016, 147 A. 741 (1929)
Hendey v. Ackerman, 103 N. J. L. 305, 136 A. 733 (1927)

Footnote continued on page 37.

strictly complied with or else the ordinance will be void.[1] Where the state legislature has required these precautions to prevent hasty and injurious interference with private property, they become absolutely necessary, and each owner must be given an opportunity to be heard in the manner provided by the law.

The amendment of the map is an amendment of the ordinance because the map is always made a part of the ordinance.[2] It often happens that at the statutory hearing the local legislative body is convinced that a different sort of map change should be made from the one advertised. Then the question arises whether there must be a new advertisement and new hearing, or whether the desired change can be made then and there. The best practice is to have a new advertisement and a new hearing if the desired change is more restrictive than the present requirement. If it is less restrictive the change can be made then and there without danger that an absent property owner, or property owners who have not been notified, can claim that they have been deprived of their rights without due process of law.

The New York City building zone resolution, not the city charter, provides that if the owners of 50 percent of the land sought to be changed on the zoning map petition the Board of Estimate in writing that Board must advertise and hold a hearing. Consequently the Board can waive this provision of its own making at any time, if it prefers to do so. It has also been pointed out that the requirement of a 50 percent petition is nothing more than the suggestion of a method by which property owners may bring a

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Footnote continued from page 36.

N. Y.—Buffalo Cremation Co. v. March, 222 App. Div. 447, 226 N. Y. S. 477, affd. 249 N. Y. 531, 164 N. E. 572 (1928)
Village of Mill Neck v. Nolan, 259 N. Y. 596, 182 N. E. 196 (1932)
Prescott v. Pierce, 130 Misc. 63, 223 N. Y. S. 609 (1927)
Retoske v. Boettger, Supreme Court, Westchester County, New York Law Journal, August 2, 1935
Schierloh v. Wood, 230 App. Div. 788, 244 N. Y. S. 651 (1930)
S. D.—City of Brookings v. Martinson, 61 S. D. 168, 246 N. W. 916 (1933)
Tenn.—Lightman v. City of Nashville, 166 Tenn. 191, 60 S. W. (2d) 161 (1933)
Tex.—Peters v. Gough, 86 S. W. (2d) 515 (1935)
Va.—Standard Oil Co. v. City of Charlottesville, 42 F. (2d) 88 (1930)

[1] *Quorum*—Kane v. Board of Appeals of Medford, 273 Mass. 97, 173 N. E. 1 (1930)
Both sides to be heard—Jones v. Lewis, 7 Pa. Dist. & Co. 785 (1926)

[2] Conn.—Katz v. Higson, 113 Conn. 776, 155 A. 507 (1931)
Mass.—Town of West Springfield v. Mayo, 265 Mass. 41, 163 N. E. 653 (1928)

proposed change of the map before the Board of Estimate, and has no relation to the power of the Board of Estimate to make the change.[1]

In connection with the adoption and amendment of zoning ordinances and maps questions of quorum, unanimity, and number of votes have arisen.[2]

Twenty Percent Protest

Most state enabling acts provide for what is usually called a 20 percent protest. Sometimes but not often a different figure has been used. It is a device for the protection of the property owner. After the local legislative body advertises a public hearing on a proposed change, usually a change of the map, the landowners most affected may file a written protest duly acknowledged. If this protest is signed by the owners of 20 percent or more of the land most affected, the change can be made only with a greater vote than a majority. In New York City, where this device was first applied, the unanimous vote of the Board of Estimate and Apportionment is necessary to make a change, if a 20 percent protest has been filed. Where councils are large, a vote of two-thirds or three-fourths is usually required. The purpose is to prevent easy or careless changes in the zoning regulations. For instance, if an owner in compliance with the ordinance has erected a six-story building, it is a serious matter for him to have the map changed so that his building is placed in a twelve-story district where it may be surrounded by new buildings twice as high as his own. The 20 percent protest will often prevent impulsive or improper map changes. The courts have upheld this requirement.[3]

[1] Lieberman v. Kleinert, Supreme Court, Kings County, N. Y., New York Law Journal, July 31, 1924

[2] Ky.—Gumm v. City of Lexington, 247 Ky. 139, 56 S. W. (2d) 703 (1933)
Md.—Montebello Land Co. v. Frank Novak Realty Co., 167 Md. 185, 172 A. 911 (1934)
N. J.—Freint v. Borough of Dumont, 108 N. J. L. 245, 157 A. 382 (1931)
N. Y.—Sterpost, Inc. v. Gennerich, Supreme Court, Westchester County, New York Law Journal, July 7, 1934

[3] N. Y.—40th St. & Park Ave., Inc. v. Walker, 133 Misc. 907, 234 N. Y. S. 708 (1929)
Melita v. Nolan, 126 Misc. 345, 213 N. Y. S. 674 (1926)

Footnote continued on page 39.

The enabling act always prescribes who the owners are who may protest. One group is composed of the owners of the land whose zoning it is sought to change. Other groups are the owners of land across the street and the owners of contiguous land at the side or in the rear. These constitute three separate groups, from any one of which there may be a protest of the specified percent. The 20 percent applicable to one group has no relation to any other group or any measurement in any other group. In the case of the usual proposed change, applied to less than a block, there may be three valid protests, each entirely independent of the others. Where several entire blocks are affected there can, of course, be only two possible protests, because there is no contiguous private land.

Some enabling acts have defined the three groups in an obscure manner. This statement is still true of the zoning regulations of the General City Law of New York. Instead of providing that the protestants shall be the owners of the area defined it is specified that they shall be the owners of the frontage defined. Much trouble has followed this mistake.[1] The frontage method of statement should be changed to the area method in every zoning enabling act.

Notice to Owners

Enabling acts require notice to owners so that they may attend public hearings or file a 20 percent protest.[2] This notice must be advertised. The period of advertising before the public hearing must be strictly complied with or else the ordinance or amendment

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Footnote continued from page 38.

Morrill Realty Corp. v. Rayon Holding Corp., 254 N. Y. 268, 172 N. E. 494 (1930)

Nichols v. O'Brien, 149 Misc. 280, 267 N. Y. S. 7 (1933)

Palmer v. Mann, 206 App. Div. 484, 201 N. Y. S. 525, affd. 237 N. Y. 616, 143 N. E. 765 (1924)

Smidt v. McKee, 262 N. Y. 373, 186 N. E. 869 (1933)

Okl.—Russell v. Murphy, 58 P. (2d) 560 (1936)

R. I.—Rhode Island Episcopal Convention v. Providence City Council, 52 R. I. 182, 159 A. 647 (1932)

Wis.—Holzbauer v. Ritter, 184 Wis. 35, 198 N. W. 852 (1924)

[1] N. Y.—Nichols v. O'Brien (1933) *ante*
Smidt v. McKee (1933) *ante*

[2] N. Y.—Estabrook v. Chamberlain, 240 App. Div. 899, 1006, 267 N. Y. S. 425 268 N. Y. S. 1015 (1933)
In re Cobb, 128 Misc. 67, 217 N. Y. S. 593 (1926)

will be void.[1] Sometimes posting of the notice is required by the enabling act.[2] This is the surest method of notification because advertisements seem never to reach all the property owners affected. Then complaint is made that the ordinance or map was changed without their being given an opportunity to be heard or to protest. The printed notice need not contain a portion of the map or the text of the amendment. It is sufficient if the proposed action and the location are clearly stated in general terms. The full amendment, consisting of text or map or both, should be on public inspection in the clerk's office, and it is well to refer to this fact in the advertisement. It is a mistake to draw the enabling act so that every neighboring property owner must receive a copy of the notice. Such a requirement will tie up the procedure.[3] Sometimes owners are permanently out of the country. Sometimes they are infants or incompetents. If every owner must be served with notice the municipality would need to examine the title to every neighboring parcel of land to find the present owner of a given property. Even when posting is followed there will always be some neighbor who will claim that he had no notice, but this cannot be helped.[4] Some enabling acts have required personal service of the

[1] Friedlander v. 465 Lexington Avenue, Inc., Supreme Court, Westchester County, Mt. Vernon Argus, January 6, 1927, 222 App. Div. 689, 224 N. Y. S. 800 (1927)

[2] Pressel v. Ferris, 148 Misc. 910, 266 N. Y. S. 517 (1933)

[3] Mass.—Kane v. Board of Appeals of Medford, 273 Mass. 97, 173 N. E. 1 (1930)
N. J.—Mingle v. Board of Adjustment of Orange, 6 N. J. Misc. 595, 142 A. 367 (1928)
N. Y.—Kirkpatrick v. Zoning Board of Appeals, Supreme Court, Westchester County, White Plains Reporter, March 16, 1925
Ottinger v. Arenal Realty Co., 257 N. Y. 371, 178 N. E. 665 (1931)

[4] The Board of Estimate and Apportionment of New York City passed a rule regarding posting. This is in addition to the requirement of advertising contained in the charter. The rule is as follows:
"33-B. No petition for a change in the Building Zone Map shall be accorded favorable action by the Board of Estimate and Apportionment unless the petitioner submits a list containing the names and addresses of all owners of property within the area affected, and opposite and adjacent thereto, together with evidence in the form of return postal cards indicating that a registered notification (in a form to be provided by the Board of Estimate and Apportionment) has been sent out to all such owners of the intent to apply for the proposed amendment or that such application is pending before the Board of Estimate and Apportionment, and also affidavits to show that within a period of one month prior to the date of filing the petition with the Secretary of the Board of Estimate and Apportionment at least

Footnote continued on page 41.

notice of hearing on landowners affected or within a certain distance. It is better to require advertising, and by a local rule to require the applicant as far as possible to give written notice of hearing to those affected.[1]

It is sometimes provided, either in the zoning enabling act or a general law, that an ordinance will take effect a certain number of days after it is posted or printed in a newspaper published in the community. As an alternative it is usually provided that personal service may be made on a property owner, and in that case the ordinance goes into effect as to him at once.[2] The map being part of the ordinance must be printed or posted, or served on the property owner.[3]

The enabling act should not require the filing of an ordinance or amendment in the county register's office. The regulations do not affect real estate titles. They are like plumbing or fire resistance regulations. If, however, the state enabling act requires filing, the regulations are without effect unless filed.[4]

Footnote continued from page 40.

three identical posters, not less than 8½ inches by 11 inches in size, describing the change, have been conspicuously exhibited and maintained for at least one week, at intervals of not more than 200 feet along the entire line of the frontages proposed to be changed, as well as along the streets immediately in the rear thereof and less than 300 feet therefrom, such poster to contain a statement to the effect that all persons interested in the proposed change will be notified not less than 10 days in advance of the date fixed by the Board of Estimate and Apportionment for a public hearing in the matter provided that they register their names and addresses with the Secretary of the Board; and copies of the posters shall be furnished to the Secretary with the petition. Whenever any change is recommended in writing by a member of the Board or by its Chief Engineer, the amendment may be considered without complying with the provisions of this rule, but in such cases the Borough Presidents are requested to take any steps they may deem necessary to give adequate notice to the owners of the property affected not less than 10 days in advance of the date fixed by the Board of Estimate and Apportionment for a public hearing in the matter."

[1] Kane v. Board of Appeals of Medford, 273 Mass. 97, 173 N. E. 1 (1930)

[2] City of Glens Falls v. Standard Oil Company, 127 Misc. 104, 215 N. Y. S. 354 (1926)

[3] Mass.—Town of West Springfield v. Mayo, 265 Mass. 41, 163 N. E. 653 (1928)
N. Y.—Friedlander v. 465 Lexington Avenue, Inc., Supreme Court, Westchester County, Mt. Vernon Argus, January 6, 1927, 222 App. Div. 689, 224 N. Y. S. 800 (1927)
City of Glens Falls v. Standard Oil Company, 127 Misc. 104, 215 N. Y. S. 354 (1926)
Pa.—Fierst v. William Penn Memorial Corporation, 311 Pa. 263, 166 A. 761 (1933)

[4] City of Benton v. Phillips, 191 Ark. 961, 88 S. W. (2d) 828 (1935)

It is bad practice to pass a supplemental zoning ordinance and then insert a provision in the original one that reference should be made to the supplement.[1] This erroneous legislative procedure always makes confusion. The state enabling act properly requires certain precautions and safeguards in the framing and enactment of the zoning ordinance. No municipality should have more than one such ordinance. If it has more than one, it will be likely to omit the statutory precautions and safeguards in the supplemental act, and confusion and misunderstanding are sure to result.

Consents and Protests of Landowners

It has been found advantageous, both in enabling acts and ordinances, to utilize written consents and protests of surrounding landowners before certain steps are taken by the local legislature or board of appeals. Sometimes provision is made for petitions, protests, and consents merely to bring additional information to these bodies. For instance, the New York City resolution provides that the Board of Estimate and Apportionment must hold a hearing if owners of 50 percent of the land to which a proposed change is applied file a petition for such change. The Board of Estimate and Apportionment may nevertheless initiate a change of the resolution or map on its own motion. It should be noticed that this check is not imposed in the charter, and therefore the Board of Estimate and Apportionment can waive or alter it.[2] The 20 percent protest will prevent a change except by the unanimous vote of the Board of Estimate and Apportionment. The 80 percent consent clothes the Board of Standards and Appeals with power to grant or refuse a nonconforming garage permit after a public hearing. The fact that consents or protests are thus provided for has tempted some framers of ordinances to provide that permits shall be issued if certain surrounding property owners consent. This method is almost always held invalid by courts. It is declared that permits can only be issued according to law, and that consenting landowners cannot make the law.

In the Cusack case it was held that where a valid police power

[1] Sheets v. Armstrong, 307 Pa. 385, 161 A. 359 (1932)

[2] Lieberman v. Kleinert, Supreme Court, Kings County, N. Y., New York Law Journal, July 31, 1924

regulation prohibited a billboard, it would be lawful for the local legislature to provide that certain consents of surrounding landowners should sanction a permit.[1] On the other hand, in the Eubank case it was held that an ordinance could not place the power of allowing the omission of a front yard in the hands of surrounding landowners affected.[2] Without recognizing the distinction between these two cases, municipalities have sometimes provided in zoning ordinances that a consent signed by surrounding landowners should be the basis for the issue of a permit by the building inspector. Experience has shown that the safest way is never to provide in an ordinance that the consents of landowners sanction the issue of a permit.[3] A good principle to follow is that government and not private individuals can legalize a discretionary permit or the withholding of it. It has been found that the introduction of discretion by the board of appeals into the zoning ordinance is much more satisfactory than an effort to follow the

[1] Cusack Co. v. City of Chicago (Ill.), 242 U. S. 526, 37 S. Ct. 190 (1917)

[2] Eubank v. City of Richmond (Va.), 226 U. S. 137, 33 S. Ct. 76 (1912)

[3] Ala.—Gillette v. Tyson, 219 Ala. 511, 122 S. 830 (1929)
Longshore v. City of Montgomery, 22 Ala. A. 620, 119 S. 599 (1928)
Standard Oil Co. v. City Commissioners, Circuit Court, Montgomery Journal, January 9, 1925
Colo.—Menzel v. Niles Co., 86 Colo. 320, 281 P. 364 (1929)
D. C.—Hazard v. Blessing, 55 App. D. C. 114, 2 F. (2d) 916 (1924)
Schwartz v. Brownlow, 50 App. D. C. 279, 270 F. 1019 (1921)
Wright v. Wardman, 55 App. D. C. 318, 5 F. (2d) 380 (1925)
Ill.—Deitenbeck v. Village of Oak Park, 331 Ill. 406, 163 N. E. 445 (1928)
Koos v. Saunders, 349 Ill. 442, 182 N. E. 415 (1932)
Spies v. Board of Appeals, 337 Ill. 507, 169 N. E. 220 (1929)
Iowa—City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N. W. 823 (1921), 188 N. W. 921 (1922)
Downey v. Sioux City, 208 Iowa 1273, 227 N. W. 125 (1929)
Marquis v. City of Waterloo, 210 Iowa 439, 228 N. W. 870 (1930)
Ky.—McCown v. Gose, 244 Ky. 402, 51 S. W. (2d) 251 (1932)
Mass.—Bennett v. Board of Appeal of Cambridge, 268 Mass. 419, 167 N. E. 659 (1929)
Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N. E. 262 (1924)
Minn.—Eha v. Bundlie, District Court, Second Judicial District, Ramsey County, St. Paul, July 23, 1931
N. Y.—Ballard v. Roth, 141 Misc. 319, 253 N. Y. S. 6 (1931)
Coley v. Campbell, 126 Misc. 869, 215 N. Y. S. 679 (1926)
City of Glens Falls v. Standard Oil Company, 127 Misc. 104, 215 N. Y. S. 354 (1926)
In re Russell, 158 N. Y. S. 162 (1916)
City of Utica v. Hanna, 202 App. Div. 610, 195 N. Y. S. 225 (1922)
Ohio—Standard Oil Co. v. Combs, 129 Oh. St. 251, 194 N. E. 875 (1935)
Pa.—Perrin's Appeal, 305 Pa. 42, 156 A. 305 (1931)

Cusack case. For instance, it is unsafe to provide that a gasoline station shall be permitted in a residence district if the owners of 80 percent of the frontage within 200 feet of the site consent in writing. It is a greater protection to the neighborhood to provide that if the owners of such 80 percent consent in writing the board of appeals can permit the station. Then the board will give a hearing, consider all sides, and grant or refuse the application. The vitalizing act will thus uniformly be the determination of the local legislative body or the board of appeals.[1]

[1] U. S.—Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 (Wash., 1928)
Va.—Martin v. City of Danville, 148 Va. 247, 138 S. E. 629 (1927)
Wis.—Wasilewski v. Biedrzycki, 180 Wis. 633, 192 N. W. 989 (1923)
See also cases cited under Board of Appeals, p. 126, and under Garages, p. 205

CHAPTER IV

ZONING DISTRICTS

Bases of Differentiation

ZONING is the regulation by districts under the police power of the height, bulk, and use of buildings, the use of land, and the density of population. Most state enabling acts for zoning require that the regulations shall be uniform for buildings of the same class throughout the district. Fire limits were in use for many years before comprehensive zoning was known. They were usually placed in building codes, but they constituted a fire resistance zoning plan and court opinions regarding them are applicable to zoning regulations. Although fire risk is one of the elements of safety, and therefore is proper to be considered in making zoning regulations, it has been discussed by courts in various collateral relations.[1]

The demand for zoning regulations as we now understand them began later in the large cities of this country because of growing congestion, impairment of access of air, light, and sunlight, and invasions by improper uses. In the early days of zoning many objectors contended that it violated the constitutional rights of private property, that the application of zoning to the land amounted to a taking of property and was not merely a reasonable regulation, and that the purposes desired could only be accomplished by eminent domain.[2] But courts early pointed out that if

[1] N. J.—Contras v. Mayor and Aldermen of Jersey City, 4 N. J. Misc. 680, 134 A. 122, 5 N. J. Misc. 59, 135 A. 472 (1926)
Manning v. Hague, 3 N. J. Misc. 329, 128 A. 375 (1925)
Rohrs v. Zabriskie, 102 N. J. L. 473, 133 A. 65 (1926)
N. Y.—Allerad Realty Corp. v. Fire Com'r of New York, 138 Misc. 232, 244 N. Y. S. 531 (1930)
See also cases cited in note 1, p. 22

[2] Kan.—City of Wichita v. Ware, District Court, 18th Judicial District, Division No. 2, July 10, 1922, 113 Kan. 153, 214 P. 99 (1923)—an excellent example of an early case in the Midwest denoting recognition of enlargement of application of police power
Minn.—Madsen v. Houghton, 182 Minn. 77, 233 N. W. 831 (1930)
Mo.—Better Built Home & Mortgage Co. v. Davis, 302 Mo. 307, 259 S. W. 80 (1924)
Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404 (1923)

the regulations were reasonable, and substantially related to the health, safety, and general welfare of the community, they should be upheld.[1] Height and area regulations brought little or no criticism from the courts.[2] It was not so, however, with the regulation of use.[3] Opposition was intense, especially in states along the

[1] U. S.—Village of Euclid (Ohio) v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926)
Del.—Mayor and Council of Wilmington v. Turk, 14 Del. Ch. 392, 129 A. 512 (1925)
Kan.—Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923)
West v. City of Wichita, 118 Kan. 265, 234 P. 978 (1925)
N. Y.—Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920)
City of Utica v. Hanna, 202 App. Div. 610, 195 N. Y. S. 225 (1922)

[2] U. S.—Gorieb v. Fox, 274 U. S. 603, 47 S. Ct. 675 (Va., 1927)
Conn.—Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920)
La.—Sampere v. City of New Orleans, 166 La. 776, 117 S. 827 (1928)
Md.—R. B. Const. Co. v. Jackson, 152 Md. 671, 137 A. 278 (1927)
Mass.—Slack v. Building Inspector of Wellesley, 262 Mass. 404, 160 N. E. 285 (1928)
Minn.—Beery v. Houghton, 164 Minn. 146, 204 N. W. 569, 273 U. S. 671, 47 S. Ct. 474 (1926)
Neb.—Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617 (1922)
N. Y.—465 Lexington Ave. Inc. v. Burden, Supreme Court, Westchester County, June 9, 1925
Gordon v. Board of Appeals, 131 Misc. 346, 225 N. Y. S. 680 (1927)
Kelmenson v. Mann, 207 App. Div. 494, 202 N. Y. S. 358, affd. 237 N. Y. 615, 143 N. E. 765 (1924)
Village of North Pelham v. Ohliger, 216 App. Div. 728, 214 N. Y. S. 253, affd. 245 N. Y. 593, 157 N. E. 871 (1927)
Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120 (1925)
N. D.—City of Bismarck v. Hughes, 53 N. D. 838, 208 N. W. 711 (1926)
Ohio—Harris v. Ball, 23 Oh. A. 33, 155 N. E. 166 (1926)
Kaufman v. City of Akron, Court of Common Pleas, Summit County, January 6, 1927
Pritz v. Messer, 112 Oh. St. 628, 149 N. E. 30 (1925)
Weiss v. Guion, 17 F. (2d) 202 (1926)
Pa.—Junge's Appeal, 89 Pa. Super. 543, 548 (1927)
Wis.—Atkinson v. Piper, 181 Wis. 519, 195 N. W. 544 (1923)
Bouchard v. Zetley, 196 Wis. 635, 220 N. W. 209 (1928)
Hayes v. Hoffman, 192 Wis. 63, 211 N. W. 271 (1926)
Piper v. Ekern, 180 Wis. 586, 194 N. W. 159 (1923)

[3] Ga.—City of Atlanta v. Smith, 165 Ga. 146, 140 S. E. 369 (1927)
Morrow v. City of Atlanta, 162 Ga. 228, 133 S. E. 345 (1926)
Smith v. City of Atlanta, 161 Ga. 769, 132 S. E. 66 (1926)
Ill.—City of Aurora v. Burns, Supreme Court, Springfield, February 17, 1925, 319 Ill. 84, 149 N. E. 784 (1925)
Md.—Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925)
Mass.—Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N. E. 262 (1924)

Footnote continued on page 47.

Atlantic coast, from New Jersey to Texas. Gradually courts in all the states pronounced use-zoning regulations lawful if reasonable.[1] The decision of the United States Supreme Court in the Euclid case had much to do with this change of attitude.[2] During the rapid spread of zoning even villages and towns began to avail themselves of its protective features.

The early arguments for zoning were all related to the needs of

Footnote continued from page 46.

Minn.—Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017 (1916)
Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159 (1920)
Vorlander v. Hokenson, 145 Minn. 484, 175 N. W. 995 (1920)
Miss.—Fitzhugh v. City of Jackson, 132 Miss. 585, 97 S. 190 (1923)
N. J.—Ignaciunas v. Town of Nutley, 99 N. J. L. 389, 125 A. 121 (1924)
Tex.—City of Dallas v. Burns, 250 S. W. 717 (1923)
Spann v. City of Dallas, 111 Tex. 350, 235 S. W. 513 (1921)

[1] Cal.—Smith v. Collison, 119 Cal. A. 180, 6 P. (2d) 277 (1931)
Zahn v. Board of Public Works of Los Angeles, 195 Cal. 497, 234 P. 388, 274 U. S. 325, 47 S. Ct. 594 (1927)
Colo.—Colby v. Board of Adjustment, 81 Colo. 344, 255 P. 443 (1927)
D. C.—Steerman v. Oehmann, Washington Law Reporter, Vol. 53, No. 28, p. 437 (1925)
Ga.—Howden v. Mayor & Aldermen of Savannah, 172 Ga. 833, 159 S. E. 401 (1931)
Ill.—City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925)
Deynzer v. City of Evanston, 319 Ill. 226, 149 N. E. 790 (1925)
Kan.—Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923)
La.—Boland v. Compagno, 154 La. 469, 97 S. 661 (1923)
Civello v. City of New Orleans, 154 La. 271, 97 S. 440 (1923)
Palma v. City of New Orleans, 161 La. 1103, 109 S. 916 (1926)
Roberts v. City of New Orleans, 162 La. 202, 110 S. 201 (1926)
Mass.—Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N. E. 262 (1924)
Spector v. Building Inspector of Milton, 250 Mass. 63, 145 N. E. 265 (1924)
Ohio—Cahn v. Guion, 27 Oh. A. 141, 160 N. E. 868 (1927)
Clifton-Highland Co. v. City of Lakewood, 41 Oh. A. 9, 179 N. E. 198, 124 Oh. St. 399, 178 N. E. 837 (1931)
Ottawa Hills Co. v. Village of Ottawa Hills, 41 Oh. A. 276, 180 N. E. 903 (1931)
Santangelo v. City of Cincinnati, 25 Ohio N. P. (N. S.) 49 (1924)
Ore.—Kroner v. City of Portland, 116 Ore. 141, 240 P. 536 (1925)

[2] Village of Euclid (Ohio) v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926); The Law of Zoning, by James Metzenbaum (Baker, Voorhis & Company, New York), 1930, p. 454. The Euclid Village decision of the United States Supreme Court did more to establish zoning in this country than any other case. Up to this time the courts of states were wavering, especially regarding zoning for use. After this sweeping decision in favor of zoning a change of attitude took place. James Metzenbaum, counsel for Euclid, and Alfred Bettman of Cincinnati, appearing as *amicus curiae* in behalf of the National Conference on City Planning, submitted to the court a mass of published material on the effects of congestion, the benefits of an abundance of light and air, and the advantages of separating the locations of residences, stores, and factories.

centers of population, like cities and villages. It was assumed that country districts and farming localities could not be zoned. It was later found, however, that altered forms of district regulations could be as well adapted to the open country as to settled communities. Lower Merion, Pa.—a large and wealthy township, composed of several fairly populous centers, many fine estates of well-to-do people whose business was in Philadelphia, extensive farms, and a few industrial areas—was one of the first townships to adopt a zoning ordinance. This and several other township experiments were so successful that townships have been almost as active as cities in adopting zoning ordinances. In residence districts agricultural uses and buildings are allowed. Small districts, usually at four corners, allow business or light industry, providing a place for stores, garages, and gasoline stations. Heavy industry districts are usually laid out in proper places near railroad switch connections or near watercourses.

The Territory Zoned

A zoning ordinance covers a single political subdivision—a city, village, borough, town, or county. Inasmuch as lands situated alike should be zoned alike, the zoning map ought to cover the whole of the political subdivision. In Massachusetts there are cities and towns, the territory of each being separate from others. In New York there are cities, villages, and towns. A city is sometimes in and part of a town; therefore it can be zoned as an entity, and the town outside of the city can be separately zoned by the town authorities. Similarly a village is in and part of a town. The village and the town outside of the village can each be separately zoned. In New Jersey there are cities, boroughs, townships, and towns, all separate from one another and constituting the entire territory of the state. In Pennsylvania there are cities, boroughs, and townships, each separate from the others.

All states have counties. In Massachusetts, New York, and Pennsylvania the territory of the county consists of its self-governing subdivisions. Therefore, if each of them desires to adopt its own zoning plan, there is no opportunity for county zoning. In the eastern part of this country towns are as insistent upon autonomy as are cities or villages. They do not want officials residing

elsewhere to determine such intimate matters as their zoning regulations. In the central part of our country, town governments are often not so unwilling to have counties assume zoning powers. Thus far, however, there are few illustrations of county zoning.[1]

In California the situation is entirely different for there are with few exceptions no towns as separate political subdivisions; there are only cities and counties. The part of a county outside of its cities must zone itself. Consequently, we find county zoning in California. It is substantially the same as town zoning in our eastern states; it is not a surrender to the county of town autonomy.

Fields of Regulation

The fields of regulation authorized in state enabling acts are usually height, area, and use of buildings, use of land, and density of population. Some acts have omitted the use of land and the omission has either been overlooked, or an attempt has been made to cure the defect by introducing the word "land" into the ordinance itself. If, however, the enabling act omits land, the municipality is powerless to supply it. The regulation of land is necessary because otherwise bare land can be used for a harmful purpose. For instance, vacant land in a residence district may be used for junk yards or cement block making or automobile dismantling plants to the serious detriment of the community.

Density of population was not one of the fields of zoning mentioned in early zoning enabling acts.[2] It was pointed out by the New York Supreme Court in 1924 that the number of families per acre could not be regulated under the provisions for area or use of buildings.[3] The words "density of population" were thereupon inserted in many of the then existing enabling acts, in the standard form of the United States Department of Commerce and in new acts based on that form. The field of "density of population" is considered to include regulations based on the number of families per acre, families per square feet of lot, and families per front feet of lot. (See pages 28 and 86)

Segregating races by districts is not within the field of zoning

[1] Wisconsin—Chapter 388 of the Laws of 1923

[2] Opinion of Justices, 124 Me. 501, 128 A. 181 (1925)

[3] Barker v. Switzer, 209 App. Div. 151, 205 N. Y. S. 108 (1924)

and would be contrary to the fourteenth amendment to the federal constitution. Efforts have been made, however, to employ zoning to separate the white and colored races.[1] The usual method has been to exclude colored people from residing in white districts and white people from residing in colored districts. The reciprocal exclusions were expected to give an appearance of reasonableness to this form of zoning. Sometimes state courts have upheld these efforts, but the United States Supreme Court have uniformly declared such zoning to be contrary to the federal constitution.

Uniformity Within a District

The usual enabling act provides that the regulations may differ in the several districts but must be uniform for each class of buildings throughout each district. This requirement of uniformity was considered most important in the early days of zoning while the subject was in the balance. Property owners would have been more hostile if they had thought that councils could select parts of districts for special favors. This rule helped to make it understood that all property situated alike would be treated alike.[2] After zoning was well established some municipalities were tempted to disregard this rule by the apparent reasonableness of making differences within a district.[3] They adjusted regulations at the boundaries of districts so as to protect adjoining more restricted districts. For instance, near the boundary line between a one-family, detached-house residence district and a multi-family residence district it would be provided that the regulations of the one-family district or some modification of them, should be observed for a certain distance within the multi-family district. This practice is not only contrary to the letter and intent of the enabling

[1] U. S.—Harmon v. Tyler, 273 U. S. 668, 47 S. Ct. 471 (La., 1927)
Ga.—Bowen v. City of Atlanta, 159 Ga. 145, 125 S. E. 199 (1924)
La.—Land Development Co. v. City of New Orleans, 164 La. 72, 113 S. 768 (1927)
Tyler v. Harmon, 158 La. 439, 104 S. 200, 160 La. 943, 107 S. 704, 273 U. S. 668, 47 S. Ct. 471 (1927)
Va.—City of Richmond v. Deans, 37 F. (2d) 712 (1930)

[2] Colo.—Hedgcock v. Reed, 91 Colo. 155, 13 P. (2d) 264 (1932)
Mich.—Holden Co. v. Connor, 257 Mich. 580, 241 N. W. 915 (1932)
N. J.—Village of South Orange v. Heller, 92 N. J. Eq. 505, 113 A. 697 (1921)
Pa.—Taylor v. Moore, 303 Pa. 469, 154 A. 799 (1931)

[3] An excellent collection of illustrations is to be found in Transition Zoning by Arthur C. Comey, Harvard University Press, Cambridge, 1933

act but it is usually ineffective in producing substantial results. Every owner is entitled to know the exact boundary line. In building he can take into account the likelihood of the boundary being altered at some future day. He can apply to the board of appeals for a variance that will adjust his proposed building in the more restricted district to the existing buildings in the less restricted district. But if there is a belt of land shown to be in one district while having the regulations in whole or part of the adjoining district, the whole situation is confused, changes of boundary are made more harmful, and the board of appeals is limited in its helpfulness. Moreover, courts cannot understand the situation clearly, and variances made on conditions that will protect the more restricted district are not clean-cut and easily enforceable. Marginal ameliorations ought to be made by the board of appeals in view of existing buildings and not by the ordinance itself. If made in the ordinance, the modification applies even if the land in the more restricted district is entirely vacant.

It has been suggested that these modifications or ameliorations near boundary lines of districts do not violate the principle of uniformity because the district is not the area shown on the zoning map but a different area as explained in the ordinance itself. This view is open to the objection that the usual ordinance refers specifically to the map as showing the districts which are created. Moreover the modifications near boundary lines often apply only part of the greater restrictions to the less restricted district. In such cases uniformity is evidently lacking.

The simple method of obviating all these difficulties and dangers is to make regulations uniform within a district, and to create additional districts whenever necessary. In some cases marginal buffer districts, shown on the zoning map, have been established. This is often justifiable, and is preferable to destroying the uniformity of the regulations.

Purposes

The following section occurs in most enabling acts under the head of "Purposes in View":

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to

secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

These "purposes in view" do not define the fields of zoning. They cannot be looked to as an enlargement or diminution of the grant of power. They have been referred to as scenery by one commentator and as atmosphere by another. They are more than that. The legislatures have thereby shown courts that the fields of regulation are based upon considerations of the community health, safety, convenience, and general welfare. They are broad enough to bring to the support of the ordinance when adopted all of the sanctions of the police power, present and future. The statements regarding buildings and land in the latter part of the section as quoted are most discriminating and illuminating, serving admirably to show the philosophy of modern zoning. They were first proposed by Lawson Purdy, long the president of the New York Department of Taxes and Assessments. They first appear in the original zoning provisions of the charter of the City of New York. The critic will notice that the increase of the value of land is not one of the purposes.[1] Land value depends on desirability and attractiveness. Increase of value, in and of itself, is not a purpose of zoning. The conservation of the value of buildings is a proper purpose, because lack of light, the congestion of streets and housing, and the invasion of harmful uses can prematurely lessen that value. Zoning should encourage "the most appropriate use of land throughout the municipality." Years have passed since these words of Mr. Purdy were crystallized in the first zoning enabling act in this country, and still many members of councils and their

[1] Cal.—City of Beverly Hills v. Anger, 110 Cal. A. 626, 294 P. 476 (1930)
Blumenthal & Co. v. Cryer, 71 Cal. A. 668, 236 P. 216 (1925)
Ind.—Dollman v. Osbon, Marion Circuit Court, Indianapolis, May 3, 1928
N. J.—Stein v. City of Long Branch, 2 N. J. Misc. 121, 100 N. J. L. 413, 126 A. 924 (1924)

advisers, and practically all petitioners for changes of zoning maps, maintain that increased value of land should be the main purpose of zoning.

Zoning should not ordinarily be used to force a change to a status not existing. Some officials will declare that the first step to redeem a blighted district is to change the zoning. If this is done, confusion and litigation are sure to result. Zoning is useful in stabilizing districts, but when through chaotic buildings and uses a locality becomes depressed, the change should be made by rebuilding or rearranging streets and parks. Then the zoning can be harmonized with the new trend as shown by actual structures. For instance, if a locality is a medley of one-family and multiple dwellings, stores, and factories, it is a mistake to zone it for one-family residences because many lots may be between stores or factories, and the ordinance will be arbitrary as to them if it tries to force an unreasonable or inappropriate use.[1] A gradual method of rehabilitation must be used with depressed districts.

Neither can distribution of business be forced by zoning. If a locality is filled with theatres, and congestion is great on sidewalks and streets, the municipality cannot lawfully amend its zoning ordinance to exclude new theatres. The police department can control the traffic, or some licensing law may be devised to prevent new theatres, but it is not a proper field for zoning. The best zoning argument for a new theatre permit is that the block is already largely occupied with theatres. Just so a zoning plan cannot space gasoline stations a certain distance apart. Such a regulation is arbitrary and unconstitutional on its face, so far as zoning principles are concerned. If three gasoline stations are on opposite corners, a fourth will ordinarily be justified in zoning.

[1] U. S.—Nectow v. City of Cambridge (Mass.), 277 U. S. 183, 48 S. Ct. 447 (1928)
Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)
Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930)
N. Y.—Cordts v. Hutton Company, 146 Misc. 10, 262 N. Y. S. 539, affd. 266 N. Y. 399, 195 N. E. 124 (1934)
Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931)
Keiser v. Village of Mineola, Supreme Court, Nassau County, New York Law Journal, March 9, 1933
City of Utica v. Hanna, 202 App. Div. 610, 195 N. Y. S. 225 (1922)
Ohio—City of Cincinnati v. Struble, 30 Ohio N. P. (N. S.) 380 (1933)
Wis.—Tingley v. Gurda, 209 Wis. 63, 243 N. W. 317 (1932)

The fair distribution of different kinds of business must be approached through private covenants or some method of trade regulation by the state or city, if any can be found. Zoning as we now understand it is not the proper instrumentality.[1] Variances made in the discretion of boards of appeals may result in adjustments.

Substantial Relation

Courts will uphold only such regulations as have a substantial relation to the health, safety, morals, comfort, convenience, and general welfare of the community. This relation should be provable in each case in its application to the lot in question.[2]

[1] N. J.—Deerfield Realty Co. v. Hague, 8 N. J. Misc. 637, 151 A. 373, 9 N. J. Misc. 857, 155 A. 893 (1931)
N. Y.—Wiegan v. Board of Standards and Appeals, Supreme Court, New York County, New York Law Journal, August 6, 1929, 229 App. Div. 320, 241 N. Y. S. 456, affd. 254 N. Y. 599, 173 N. E. 883 (1930)

[2] U. S.—Village of Euclid (Ohio) v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926)
Nectow v. City of Cambridge (Mass.), 277 U. S. 183, 48 S. Ct. 447 (1928)
Cal.—Miller v. Board of Public Works of Los Angeles, 195 Cal. 477, 234 P. 381 (1925)
Zahn v. Board of Public Works of Los Angeles, 195 Cal. 497, 234 P. 388, 274 U. S. 325, 47 S. Ct. 594 (1927)
Colo.—Averch v. City of Denver, 78 Colo. 246, 242 P. 47 (1925)
Spiegleman v. Williams, District Court, Denver, May 6, 1929
Del.—Mayor and Council of Wilmington v. Turk, 14 Del. Ch. 392, 129 A. 512 (1925)
D. C.—Bugher v. Gottwals, 60 App. D. C. 340, 54 F. (2d) 451 (1931)
Dorsey v. Gotwals, 61 App. D. C. 41, 57 F. (2d) 407 (1932)
Ill.—City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925)
Deynzer v. City of Evanston, 319 Ill. 226, 149 N. E. 790 (1925)
Ehrlich v. Village of Wilmette, 361 Ill. 213, 197 N. E. 567 (1935)
Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767 (1932)
Kennedy v. City of Evanston, 348 Ill. 426, 181 N. E. 312 (1932)
Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930)
Tews v. Woolhiser, 352 Ill. 212, 185 N. E. 827 (1933)
Iowa—City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N. W. 823 (1921), 188 N. W. 921 (1922)
Kan.—Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923)
Ky.—Fowler v. Obier, 224 Ky. 742, 7 S. W. (2d) 219 (1928)
La.—Giangrosso v. City of New Orleans, 159 La. 1016, 106 S. 549 (1925)
Md.—Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925)
Lipsitz v. Parr. 164 Md. 222, 164 A. 743 (1933)
Mo.—Women's Kansas City St. Andrew Soc. v. Kansas City, 58 F. (2d) 593 (1932)
N. Y.—Alexe v. Isbister, Supreme Court, Westchester County, May 29, 1925, 215 App. Div. 838, 213 N. Y. S. 754 (1926)
Village of Brightwaters v. Di Blasi, Supreme Court, Suffolk County, New York Law Journal, May 22, 1926

Footnote continued on page 55.

A zoning ordinance, however, is more than the aggregate of its separate regulations, as applicable to particular parcels of land. The ordinance as a whole should have the necessary "substantial relation" to the health, safety, and general welfare of the community, and each regulation applicable to a particular parcel of land should be a consistent part of the whole.[1]

Courts have often declared that the duty of making zoning regulations is on the local legislature. Even if the courts conclude that the regulations are inferior, or that they would themselves make them far differently, nevertheless they consider that they are bound to uphold the regulations if they meet the requirement of substantial relation to the health, safety, morals, comfort, convenience, and general welfare of the community.[2] If the ordinance as a whole has this substantial relation, and its regulations are not discriminatory, the courts incline to enforce them.[3]

Even where this substantial relation is lacking, the passage of a zoning ordinance by the local legislative body will not usually be

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Footnote continued from page 54.

Cordts v. Hutton Company, 146 Misc. 10, 262 N. Y. S. 539, affd. 266 N. Y. 399, 195 N. E. 124 (1934)
Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931)
Eaton v. Sweeny, 257 N. Y. 176, 177 N. E. 412 (1931)
Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N. Y. S. 178, affd. 261 N. Y. 506, 185 N. E. 714 (1933)
Village of Granville v. Krause, 131 Misc. 752, 228 N. Y. S. 204 (1928)
Keiser v. Village of Mineola, Supreme Court, Nassau County, New York Law Journal, March 9, 1933
MacEwen v. City of New Rochelle, 149 Misc. 251, 267 N. Y. S. 36 (1933)
Stevenson v. Tilley, Supreme Court, Kings County, New York Law Journal, September 10, 1930
City of Utica v. Hanna, 202 App. Div. 610, 195 N. Y. S. 225 (1922)
Willerup v. Village of Hempstead, 120 Misc. 485, 199 N. Y. S. 56 (1923)
Ohio—Ottawa Hills Co. v. Village of Ottawa Hills, 41 Oh. A. 276, 180 N. E. 903 (1931)
Ore.—Roman Catholic Archbishop v. Baker, 140 Ore. 600, 15 P. (2d) 391 (1932)

[1] U. S.—Village of Euclid (Ohio) v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926)
Cal.—Harris v. City of Piedmont, 5 Cal. A. (2d) 146, 42 P. (2d) 356 (1935)
Ky.—Fowler v. Obier, 224 Ky. 742, 7 S. W. (2d) 219 (1928)

[2] Cal.—Brougher v. Board of Public Works of San Francisco, 107 Cal. A. 15, 290 P. 140 (1930)
Ill.—Minkus v. Pond, 326 Ill. 467, 158 N. E. 121 (1927)
Va.—Downham v. City Council of Alexandria, 58 F. (2d) 784 (1932)
Wis.—City of La Crosse v. Elbertson, 205 Wis. 207, 237 N. W. 99 (1931)

[3] Women's Kansas City St. Andrew Soc. v. Kansas City (Mo.), 58 F. (2d) 593 (1932)

enjoined by the courts, but its enforcement after passage will be enjoined, if the regulation is unconstitutional. There is no more reason why courts should prevent a local legislative body from acting within the scope of its authority than that they should enjoin a state legislature from passing laws. The practice has become too common to appeal to courts to prevent local legislation. Legislative bodies acting within the scope of their authority are supposed to be of equal standing and dignity with courts. The courts have great powers in adjudicating the constitutionality of legislative acts, and there is no good reason why the exercise of this power should not wait until the questioned act is passed. The constitutionality of a regulation can be better weighed after its passage than before, and the court can judge what presumption of constitutionality it must grant to the legislative body in the exercise of legislative discretion.[1]

The original zoning of many cities allowed too great density and set apart too great areas for business and industry. Usually this happened because there was not time for careful discrimination. All zoning was problematical in the early days and there was a distinct tendency for the authorities to be unnecessarily liberal. There is today a general desire on the part of city councils, and still more on the part of planning commissions, to review and amend the zoning maps. Few cases on this subject have found their way into court. In one case the court strongly approved this tightening up process which had been favored by the planning commission.[2]

Height and Area

In imposing height and area regulations it is assumed that there is need for greater density in central areas than in the suburbs. In central areas given over to business, people need to be near one another for intercommunication, buying and selling, delivery of business documents, and conduct of government. Such areas are equipped for the intensive working hours. Their buildings can

[1] Md.—Broening v. Haley, 156 Md. 605, 144 A. 836 (1929)
N. Y.—Steck v. Mayor of Buffalo, Supreme Court, Erie Co., Baltimore (Md.) Daily Record, March 20, 1925

[2] Corbett v. Carson, Mayor of Portland (Ore.), Circuit Court, August, 1935

properly be higher and nearer together than elsewhere.[1] At the other extreme are the suburbs where families live and children grow up. In such areas there is no need for density of population but for the greatest allowance of space, sunlight, and air.[2] Gradations of density lie between these extremes. There are local business streets and areas where multi-family houses are suitable for people who need to be within walking distance of their work. Zoning recognizes these differences in customary needs. A zoning plan based on such considerations alone would be approved by the courts because it would prevent invasions by unnecessarily high buildings and harmful densities.

But the specific limitation of height and area in every district is supported by numerous detail considerations.[3] High buildings cannot be so well protected against fire. They make dark canyons of streets. Lower floors need artificial light in the daytime. High buildings, coupled with great density, overload the capacity of streets.[4] Density in residence localities prevents an abundance of sunlight and affects the free movement of air. Congestion of living quarters comes with the increase of the human burden on the land, bringing greater danger of contagious disease, greater fire risk, more deliveries of goods and more litter, dust, fumes, and noise.[5]

Some ambitious municipalities, thinking that one-story stores are a sign of backwardness, have required all stores to be two stories

[1] Cal.—Brougher v. Board of Public Works of San Francisco, 205 Cal. 426, 271 P. 487 (1928), 107 Cal. A. 15, 290 P. 140 (1930)
Wis.—Atkinson v. Piper, 181 Wis. 519, 195 N. W. 544 (1923)

[2] U. S.—Gorieb v. Fox, 274 U. S. 603, 47 S. Ct. 675 (Va., 1927)
Cal.—Thille v. Board of Public Works of Los Angeles, 82 Cal. A. 187, 255 P. 294 (1927)
Ill.—Deynzer v. City of Evanston, 319 Ill. 226, 149 N. E. 790 (1925)
Mass.—Slack v. Building Inspector of Wellesley, 262 Mass. 404, 160 N. E. 285 (1928)
N. Y.—Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120 (1925)
Ohio—Harris v. Ball, 23 Oh. A. 33, 155 N. E. 166 (1926)
Pa.—Junge's Appeal, 89 Pa. Super. 543, 548 (1927)
Wis.—Bouchard v. Zetley, 196 Wis. 635, 220 N. W. 209 (1928)

[3] Report of Heights of Buildings Commission (New York City), December 23, 1913

[4] Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)

[5] N. J.—E. & M. Land Co. v. Board of Adjustment of Newark, 4 N. J. Misc. 467, 133 A. 413, affd. 103 N. J. L. 487, 135 A. 917 (1927)
Ohio—Morris v. East Cleveland, 22 Ohio N. P. (N. S.) 549, 31 Ohio Dec. 98, 197 (1920)

or more in height. When this regulation has been brought to the attention of courts it has always been set aside. They seem to consider that it is based on esthetics. It is, of course, hard to perceive how a two-story store is more safe or more conducive to health than a one-story store.[1]

In New York City difficult situations involving allowable height have arisen. Provisions regarding buildings fronting on parks and public places, and their modification of allowable height, have been interpreted.[2]

Ordinarily the lack of a sewer system will not be held to justify a low height limitation. However, it is customary to show the presence or lack of a sewer system in determining the reasonableness of height limitation. It has been held that a three-story limit is justified by the sewerage situation.[3]

Similarly the lack of a fire department has not been considered a good reason for prohibiting apartment houses.[4]

Vision Clearance

Street accidents are prevented by enlarging the angle of vision at corners. Many ordinances provide that hedges and trees in residence districts shall not be so placed that they prevent vision across a corner. A few ordinances provide that when a pier or column supports a building on a corner in a business district vision across the triangle and back of the column shall be unimpeded. This corner open space or vision clearance has been required only

[1] Ill.—Brown v. Board of Appeals of Springfield, 327 Ill. 644, 159 N. E. 225 (1927)
N. J.—Dorison v. Saul, 98 N. J. L. 112, 118 A. 691 (1922)
Romar Realty Co. v. Board of Com'rs of Haddonfield, 96 N. J. L. 117, 114 A. 248 (1921)
N. Y.—Oppenheimer v. Kraus, 221 App. Div. 773, 223 N. Y. S. 467, affd. 246 N. Y. 559, 159 N. E. 651 (1927)

[2] N. Y.—Lash Realty Co. v. Walsh, Supreme Court, New York County, New York Law Journal, October 31, 1924, affd. 213 App. Div. 815, 208 N. Y. S. 920 (1925)
111 John St. Corp. v. Connell, Supreme Court, New York County, New York Law Journal, May 8, 1931, affd. 235 App. Div. 611, 254 N. Y. S. 1083 (1932)

[3] Van Duyne v. Senior, 105 N. J. L. 257, 143 A. 437 (1928)

[4] N. J.—Ingersoll v. Village of South Orange, 3 N. J. Misc. 335, 128 A. 393, 102 N. J. L. 218, 130 A. 721 (1925)
Karke Realty Associates v. Mayor, etc., of Jersey City, 104 N. J. L. 173, 139 A. 55 (1927)

for the first story. The reports do not contain decisions of courts on this and similar subjects. Billboards may be excepted from this statement. Property owners will strongly oppose regulations which prevent building on part of their land, in order to lessen street accidents. They will claim that the streets should be made wider or the corners should be rounded off by the use of eminent domain. In one case the court held that a permit to erect an apartment building on a corner cannot be refused on the ground of cutting off vision.[1]

Methods of Area Regulation

One method of area regulation is the requiring of front, side, and rear yards.[2] The required depth of front yards cannot be made too great or courts will hold that it is unreasonable and based on esthetics.[3] It is far better to require a uniform depth than to make the depth depend on houses then existing or that may be built in the future. Courts have sometimes, however, upheld regulations of the latter kind. In certain areas they are called

[1] Tenez Const. Corp. v. Garner, 4 N. J. Misc. 485, 133 A. 396 (1926)

[2] Conn.—Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920)
D. C.—Castleman v. Avignone, 56 App. D. C. 253, 12 F. (2d) 326 (1926)
Ill.—Binder v. Hejhal, 347 Ill. 11, 178 N. E. 901 (1931)
Kan.—Ware v. City of Wichita, District Court, Sedgwick County, 1924, 118 Kan. 265, 234 P. 978 (1925)
Md.—R. B. Const. Co. v. Jackson, 152 Md. 671, 137 A. 278 (1927)
Mass.—Commonwealth v. Dillon, 277 Mass. 196, 178 N. E. 521 (1931)
Sinclair v. Superintendent of Public Buildings of Waltham, 274 Mass. 338, 174 N. E. 510 (1931)
N. J.—Burg v. Ackerman, 5 N. J. Misc. 96, 135 A. 672 (1927)
Hack v. Scales, 6 N. J. Misc. 307, 141 A. 4 (1928)
N. Y.—Fimiani v. Board of Appeals of Buffalo, 233 App. Div. 552, 253 N. Y. S. 757, affd. 258 N. Y. 613, 180 N. E. 355 (1932)
465 Lexington Ave. Inc. v. Burden, Supreme Court, Westchester County, June 9, 1925
Gordon v. Board of Appeals, 131 Misc. 346, 225 N. Y. S. 680 (1927)
Kelmenson v. Mann, 207 App. Div. 494, 202 N. Y. S. 358, affd. 237 N. Y. 615, 143 N. E. 765 (1924)
Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120 (1925)
Ohio—Neithamer v. Heyer, 39 Oh. A. 532, 177 N. E. 925 (1931)
Pritz v. Messer, 112 Oh. St. 628, 149 N. E. 30 (1925)
Pa.—Junge's Appeal, 89 Pa. Super. 543, 548 (1927)
Wis.—Hayes v. Hoffman, 192 Wis. 63, 211 N. W. 271 (1926)

[3] Ware v. City of Wichita, District Court, Sedgwick County, 1924, 118 Kan. 265, 234 P. 978 (1925)

"travelling, front-yard regulations,"[1] because the destruction of an existing house or the construction of a new house will alter the front-yard requirement.

Where a residence street having a front-yard requirement enters a business street, it is an advantage to the former to prevent stores from covering the entire corner space. The owners of the residences often try to persuade the authorities to require a substantial area on the business street to be left open in order to prevent cutting off the continuity of their front yards. They fail to consider that it is a serious matter for the owner of a corner lot, having a frontage of fifty feet on the business street, if he must leave half of it unbuilt and yet continue to pay taxes on the whole. Courts are likely to hold that the requirement of a large open corner is unreasonable, but will consider that a small yard requirement of from four to eight feet is reasonable. Some cities have employed this sort of zoning in an extremely drastic manner where the regulation has had no substantial relation to the community health, safety, convenience, and general welfare.[2]

In relation to corner lots it is sometimes difficult to determine which street shall be considered the front. If left to the owner to select his front, he may place the side of his building on the main street, making a narrow side yard and preventing uniformity on the main street. For instance, in case of a corner lot one hundred feet by one hundred feet, the owner could erect two buildings fronting either street. If he chose to front them on the minor street, he could disarrange the harmony of the building plan and cause injury to his neighbors. Some cities have provided that the building in such a case shall front the wider street; others that it shall front the street having the higher land values on the assessment maps; and still others have established front-yard maps of the entire city, considering that such a map is an area-map supplement. The last method is probably the most exact and satisfactory although the other methods may be adapted to the needs of each

[1] U. S.—Gorieb v. Fox, 274 U. S. 603, 47 S. Ct. 675 (Va., 1927)
N. J.—Ricci v. Meyer, 5 N. J. Misc. 102, 135 A. 666 (1927)
Vatter v. Kaltenbach, 3 N. J. Misc. 665, 129 A. 926, 102 N. J. L. 470, 131 A. 900 (1926)

[2] Colo.—Hedgcock v. Reed, 91 Colo. 155, 13 P. (2d) 264 (1932)
Mich.—Holden Co. v. Connor, 257 Mich. 580, 241 N. W. 915 (1932)

city. The danger to avoid is a wording of the ordinance which leaves the choice of front to the owner.[1] This matter becomes especially important where a front-yard requirement is imposed on business districts.

Open porches are usually allowed by ordinances to extend a certain distance into the front yard. Where buildings have a uniform front line, the projection of an open porch that does not cut off the vision, light, and air of neighbors has been considered comparatively unobjectionable. But there are drawbacks. Some one will first enclose his porch with screens, and later insert removable windows in the winter. Insistence on the right to enclose such porches has given rise to litigation.[2] Some builders have taken advantage of the porch privilege to insert permanent windows and even radiators, thus making additional rooms nearer the street than their neighbors' rooms. Municipalities cannot be too careful about this matter of porches in front yards. Because unfair builders will take advantage of the slightest loophole, the ordinance should be worded so as to make sure that such porches will be as open to light, air, and visibility as possible.[3] So long as there is a provable relation of the regulation to the access of light and air, the courts will be more inclined to uphold the constitutionality of the ordinance.

Before the days of zoning some states empowered municipalities to establish so-called set-back or building lines by eminent domain. This practice seems to have caused certain municipalities to call their front-yard requirements zoning set-back lines. They ought to be called front-yard requirements. That term does not confuse courts. It shows that the front yards are established for the same reasons as side and rear yards—that is, because they increase light, air, and quiet.[4] Calling them set-back lines tempts ignorant offi-

[1] Rollins v. Armstrong, 251 N. Y. 349, 167 N. E. 466 (1929)

[2] N. J.—Mulleady v. City of Trenton, 9 N. J. Misc. 1102, 156 A. 843 (1931)
Parker v. Brennan, 2 N. J. Misc. 260 (1924)
N. Y.—Herman v. Walsh, Supreme Court, Kings County, New York Law Journal, December 7, 1926
Pa.—White's Appeal, 287 Pa. 259, 134 A. 409 (1926)

[3] Valicenti's Appeal, 298 Pa. 276, 148 A. 308 (1929)

[4] D. C.—Castleman v. Avignone, 56 App. D. C. 253, 12 F. (2d) 326 (1926)
Ind.—Major v. Board of Zoning Appeals, Circuit Court, Marion County, Indianapolis, September 7, 1928

Footnote continued on page 62.

cials to state, sometimes in print, that one of the reasons for their establishment is a possible or prospective street widening. Inasmuch as courts insist that the compulsory creation of a street shall be by eminent domain, such a statement can be introduced in court to show that the front-yard requirement was not made for reasons of health and safety but indirectly as the first step in a street widening.[1]

Many ordinances have followed that of New York City in limiting building area to a fraction of the lot area. For instance, in New York the building area in an E district must not exceed 30 percent of the lot area. There have been few court decisions on the subject of allowable building area, although many such cases come before boards of appeals.[2] The regulation must not be so drastic that it compels an absurdly small house on a normal lot or an unreasonably large lot for a normal house. The location, whether suburban or in the thickly-settled part of a city, should be considered. Then, too—at the basis of the figure used—there must be a substantial relation between the regulation and the community health, safety, and general welfare.

When the required yard space is dedicated to a particular building, as it is so long as that building exists, the same land cannot be used as the required yard for another main building.[3]

Footnote continued from page 61.

La.—Sampere v. City of New Orleans, 166 La. 776, 117 S. 827 (1928)
Mass.—Commonwealth v. Dillon, 277 Mass. 196, 178 N. E. 521 (1931)
Slack v. Building Inspector of Wellesley, 262 Mass. 404, 160 N. E. 285 (1928)
N. Y.—Town of Islip v. Summers C. & L. Co., 257 N. Y. 167, 177 N. E. 409 (1931)
Village of North Pelham v. Ohliger, 216 App. Div. 728, 214 N. Y. S. 253, affd. 245 N. Y. 593, 157 N. E. 871 (1927)
Van Auken v. Kimmey, 141 Misc. 105, 117, 252 N. Y. S. 329, 343 (1930–1931)
Ohio—Harris v. Ball, 23 Oh. A. 33, 155 N. E. 166 (1926)
Kaufman v. City of Akron, Court of Common Pleas, Summit County, January 6, 1927
L. & M. Inv. Co. v. Cutler, 125 Oh. St. 12, 180 N. E. 379 (1932)
Weiss v. Guion, 17 F. (2d) 202 (1926)
Va.—Nusbaum v. City of Norfolk, 151 Va. 801, 145 S. E. 257 (1928)
Wis.—Wittenberg v. Board of Appeals of West Allis, Circuit Court, Milwaukee County, December 6, 1929

[1] Bouchard v. Zetley, 196 Wis. 635, 220 N. W. 209 (1928)

[2] Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617 (1922)

See also under Families Per Acre, p. 86

[3] Wood v. Building Com'r of Boston, 256 Mass. 238, 152 N. E. 63 (1926)

Prevention of such double use of land cannot be attained by forbidding the granting of the land by the first owner to the second. Land ought to be freely alienable and all our states insist on keeping it so. If land dedicated to a particular building is granted, it remains so dedicated, and the grantee cannot obtain his permit if he shows the same land on his plat. If the second builder deceives the building inspector by placing on his plat, as required yard space, land which has already been dedicated to another existing building, it will be considered that he has obtained his permit by deception and the permit will be withdrawn by the authorities or the certificate of occupancy will be canceled. It cannot be held that an encumbrance is created. All are supposed to know the law, and if the second builder does not know how the zoning regulations apply to surrounding buildings, the duty is on him to learn. The offices of corporation counsel throughout the country have had occasion to analyze this situation, and have come to conclusions stated here.

Most ordinances are worded so as to preserve required yards around houses in existence before the zoning ordinance was passed. Similarly yards dedicated to an existing house cannot be the required yards for a new house.[1]

Use Regulations

Use districts are ordinarily residential, business, and industrial. The district of less restricted use always admits the uses of the more restricted ones. Perhaps the only exceptions to this statement are in a few cities where dwellings are excluded from industrial districts.[2] When Greater New York was zoned there was no segregation of residence districts according to the number of families in a dwelling. It was feared that courts would not uphold districting on that basis because of the difficulty of showing that the number of families, apart from space requirements per family, was substantially related to the health and safety of the community. For instance, a two-family house on a lot twice as large as the lot for a one-family house might seem to be equally safe

[1] Wood v. Building Com'r of Boston, 256 Mass. 238, 152 N. E. 63 (1926)
[2] America Land Co. v. City of Keene (N. H.), 41 F. (2d) 484 (1930)

and healthful.[1] Accordingly control of the number of families was left to area-district regulations. But the demand throughout the country for the segregation of detached, one-family houses from multi-family houses was so great, and the proof so clear that there were health and safety considerations that justified such a separation that courts gradually recognized as valid the gradations of residence districts according to number of families per unit building.[2] This means that a two-family-house district or a multi-family-house district is based on a use regulation and not on an area or density-of-population regulation.

The exclusion of business from a residence district was the most serious of zoning problems for several years.[3] Many courts held that the exclusion of stores was for esthetic reasons, and that the health and safety of the community were not affected.[4] Many

[1] Cal.—Blumenthal & Co. v. Cryer, 71 Cal. A. 668, 236 P. 216 (1925)
Ill.—Bjork v. Safford, 333 Ill. 355, 164 N. E. 699 (1928)
N. J.—Handy v. Village of South Orange, 118 A. 838 (1922)
Vernon v. Mayor & Council of Westfield, 98 N. J. L. 600, 124 A. 248 (1923)

[2] Cal.—Miller v. Board of Public Works of Los Angeles, 195 Cal. 477, 234 P. 381 (1925)
Colo.—Spiegleman v. Williams, District Court, Denver, May 6, 1929
Ill.—Village of Western Springs v. Bernhagen, 326 Ill. 100, 156 N. E. 753 (1927)
Ind.—Dollman v. Osbon, Marion Circuit Court, Indianapolis, May 3, 1928
Mass.—Bianchi v. Commissioner of Public Buildings of Somerville, 279 Mass. 136, 181 N. E. 120 (1932)
Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269 (1924)
N. Y.—Alexe v. Isbister, Supreme Court, Westchester County, May 29, 1925, 215 App. Div. 838, 213 N. Y. S. 754 (1926)
Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N. Y. S. 178, affd. 261 N. Y. 506, 185 N. E. 714 (1933)
Ohio—Dantzig v. Durant, 21 Ohio Law Reporter 395 (1923)
Koch v. City of Toledo, 37 F. (2d) 336 (1930)
Morris v. East Cleveland, 22 Ohio N. P. (N.S.) 549, 31 Ohio Dec. 98, 197 (1920)
Okl.—De Lano v. City of Tulsa, 26 F. (2d) 640 (1928)

[3] Ga.—Reynolds v. Brosnan, 170 Ga. 773, 154 S. E. 264 (1930)
Ore.—Kroner v. City of Portland, 116 Ore. 141, 240 P. 536 (1925)

[4] Ga.—City of Atlanta v. Smith, 165 Ga. 146, 140 S. E. 369 (1927)
Morrow v. City of Atlanta, 162 Ga. 228, 133 S. E. 345 (1926)
Noland v. Bowen, 39 Ga. A. 813, 148 S. E. 596 (1929)
Smith v. City of Atlanta, 161 Ga. 769, 132 S. E. 66 (1926)
Ill.—City of Aurora v. Burns, Supreme Court, Springfield, February 17, 1925, 319 Ill. 84, 149 N. E. 784 (1925)
N. J.—Ignaciunas v. Town of Nutley, 99 N. J. L. 389, 125 A. 121 (1924)
Tex.—City of Dallas v. Burns, 250 S. W. 717 (1923)
City of Dallas v. McElroy, 254 S. W. 599 (1923)
City of Dallas v. Mitchell, 245 S. W. 944 (1922)

Footnote continued on page 65.

states passed through an early period of court disapproval of use zoning, followed by a period of zoning disorganization, in which there was a popular demand for a constitutional amendment legalizing use zoning. Then either by reason of the adoption of a constitutional amendment, or the passage of a better enabling act, the courts began to approve use zoning.[1]

The state of Missouri is a good illustration of this gradual progress. St. Louis early passed a zoning ordinance before there was a state enabling act for zoning. The city charter gave ample powers to the city but the courts halted in their approval of use zoning, and the use regulations were declared void. The city accordingly suffered great injury from invasions of out-of-place stores, garages, and factories. The injury was the greater because the prior brief period of zoning protection had caused exploiters to perceive the value of certain out-of-place uses. A demand then arose, not only in St. Louis but in all the municipalities of the state, for a constitutional amendment; but before one was adopted an excellent state enabling act for zoning was passed. St. Louis therefore adopted another ordinance and other cities in the state took advantage of the new law. By that time, since courts throughout the country had more generally favored use zoning,[2] the attitude of the courts of Missouri toward the practice had changed, and it was held that stores and other business uses could be lawfully excluded from certain districts.[3]

The state of New Jersey is an equally good example. Although an enabling act was passed, the courts declared in the Nutley case that there was no lawful reason why a store should be excluded

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Footnote continued from page 64.

City of Dallas v. Urbish, 252 S. W. 258 (1923)
Hill v. Storrie, 236 S. W. 234 (1921)
Lombardo v. City of Dallas, 124 Tex. 1, 73 S. W. (2d) 475 (1934)
Spann v. City of Dallas, 111 Tex. 350, 235 S. W. 513 (1921)

[1] Ga.—Howden v. Mayor & Aldermen of Savannah, 172 Ga. 833, 159 S. E. 410 (1931)
Ill.—City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925)
Deynzer v. City of Evanston, 319 Ill. 226, 149 N. E. 790 (1925)
La.—Roberts v. City of New Orleans, 162 La. 202, 110 S. 201 (1926)

[2] Minn.—Beery v. Houghton, 164 Minn. 146, 204 N. W. 569, 273 U. S. 671, 47 S. Ct. 474 (1926)
N. D.—City of Bismarck v. Hughes, 53 N. D. 838, 208 N. W. 711 (1926)

[3] Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S. W. 720 (1927)

from a residence district. For several years a succession of references by courts to the Nutley case[1] prevented use zoning. Municipalities saw no way out of the difficulty but to secure a constitutional amendment. This amendment is discussed on page 18.

Constitutional amendments, as pointed out in Chapter I (page 17), ought not to be necessary to cause the courts to recognize reasonable regulation under the police power. If a regulation is unreasonable it ought not to be upheld, whether or not there is a constitutional amendment.

The Nutley case was an unfortunate beginning of court analysis of use zoning in New Jersey. The trial had shown nothing to relate the regulation with the community health, safety, or welfare. The only proof by means of which it was attempted to justify the employment of the police power to exclude a store from a residence district was that the location of the proposed store was distant from the village policeman, and that the builder had displeased the citizens by some of his previous performances. The subject was novel and the court could hardly be expected to supply what the proof lacked. Later in New Jersey, and in many other states where use zoning was in doubt, it became customary to show by evidence that a store in a residence district increased the fire hazard, and also street traffic, litter, and dust.[2]

In an important early case in Washington, D. C., regarding the lawfulness of excluding a new store from a residence district, the celebrated Dr. George M. Kober, formerly connected with the

[1] Ignaciunas v. Town of Nutley, 99 N. J. L. 389, 125 A. 121 (1924)
See also cases cited in note 3 (p. 15) and in note 1 (p. 19)

[2] Cal.—Smith v. Collison, 119 Cal. A. 180, 6 P. (2d) 277 (1931)
Zahn v. Board of Public Works of Los Angeles, 195 Cal. 497, 234 P. 388, 274 U. S. 325, 47 S. Ct. 594 (1927)
Conn.—City of Hartford v. Katz, Superior Court, Hartford County, July 30, 1925
D. C.—Steerman v. Oehmann, Washington Law Reporter, Vol. 53, No. 28, p. 437 (1925)
Ill.—City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925)
Kan.—Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923)
La.—Civello v. City of New Orleans, 154 La. 271, 97 S. 440 (1923)
Palma v. City of New Orleans, 161 La. 1103, 109 S. 916 (1926)
Roberts v. City of New Orleans, 162 La. 202, 110 S. 201 (1926)
Mass.—Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N. E. 262 (1924)
Spector v. Building Inspector of Milton, 250 Mass. 63, 145 N. E. 265 (1924)

sanitation of the Panama Canal Zone, testified regarding his study of house flies. He showed that their life was short and that they spent it near the spot of their origin. They spread disease, not by lighting on infected meat or vegetables, but by lighting on sick persons and then lighting on meat and vegetables in stores, thus infecting the food supply which went out to the neighborhood. He showed that other vermin could and did in this way spread disease. The court decided that the segregation of stores from residences was substantially related to the community health and safety.[1]

As use zoning gradually became better established, some municipalities tried to employ it for unlawful purposes. They attempted to establish districts for public buildings only, or for selected kinds of stores only, or for high-type multiple-family houses only. The framers of these ordinances forgot that they must be based on health, safety, and the general welfare, and must not be discriminatory. They tried to employ zoning regulations to bring about some desired architectural arrangement. But if a district is set aside for public offices, it is hard to see why private offices must not also be permitted. A city hall has no desirable qualities that an office building does not or should not have. If a city hall is permitted in a zoning district, then it is usually unlawful to exclude the office building. Similarly if a book store and a jewelry store are permitted in a business street, hardware stores and furniture stores must also be permitted. The former uses may be more exclusive, but it would be hard to show that they are more intimately related to the health and safety of the community than the latter. The same reasoning would prevent the exclusion of a fraternity house from a residence district where the fraternity house is no more injurious than large private residences.[2] If a district is zoned for multi-family houses, it is hard to see how a two-family house can be excluded from it. The burden rests upon the municipality to show that the excluded use is more hurtful than the permitted uses.

One of the early efforts in use zoning was to exclude residences

[1] Steerman v. Oehmann, Washington Law Reporter, Vol. 53, No. 28, p. 437 (D.C., 1925)

[2] Appeal of Thompson, Court of Common Pleas, Allegheny County, Pa., October Term, 1925, and June 29, 1926

See also cases on page 197, note 3

from industrial districts. There was much to be said for this practice in that homes ought not to be among factories, and factory uses ought to be protected from constant complaints of common law nuisance. The Newark (N. J.) ordinance excludes residences in the industrial districts in the low-lying salt meadows. In such localities, now largely given over to industry, this exclusion would doubtless be held to be lawful largely on the ground that the high water-table prevented the sanitary conveniences that should be furnished to residences. However, on upland terrain—where homes can well exist until the land is needed for industry—it would be unreasonable to prevent residences. Then, too, an owner in such a locality might well say that his plot was too small for a factory, that owners of existing factories would not buy his land, that a store would be a total loss, and that to prohibit him from building a home would prevent his earning any return whatever on his land. Such considerations have prevented the widespread employment of this particular kind of exclusion. Under the usual zoning plan, where owners of land can build residences in industrial districts, whoever does so will assume the risk of having factories next door. Occupation for residence purposes will probably be temporary—until such time as the land can be used for factories.

In some suburban municipalities occupied by well-to-do commuters, efforts have been made to employ use regulations for the same purpose as restrictive covenants. The highest-class residence district is restricted to one-family detached houses; and schools, churches,[1] clubs, and libraries are excluded. The purpose is to obtain through a zoning ordinance a community exclusively of high-class private residences. It is a grave question whether this is a reasonable exercise of the police power. If the specified uses are harmful in the residence district having the largest yards, it is difficult to see why they would not be even more so in residence districts having smaller yards or partly built up with multi-family houses.

The fact that a zoning ordinance allows existing nonconforming uses to continue in a district where new uses of the same sort are prohibited does not render the ordinance void. There was con-

[1] Ill.—Phelps v. Board of Appeals of Chicago, 325 Ill. 625, 156 N. E. 826 (1927)
W. Va.—Howell v. Meador, 109 W. Va. 368, 154 S. E. 876 (1930)

siderable uncertainty caused in the early days of zoning in Illinois by a court decision that this procedure was unlawful.[1] A more practical and reasonable view was, however, taken by courts throughout the country. It is apparent that the Illinois case if followed would have been fatal to zoning.[2]

Many ordinances include public parks among the permissive uses in residence districts. However, public parks can be used for public recreation, and zoning cannot increase or diminish the extent of this use. On the original use map of New York City public parks were not shown, although they were shown on the height and area maps. It was considered that the city should conform the height and area of recreational and service buildings to the park surroundings. Zoning cannot modify the recreational uses of a public park. For instance, a zoning regulation cannot exclude skating from a public park.

Low-lying land is often of a character that may be termed normally industrial land. It frequently happens that owners on higher land in residence districts desire to improve their surroundings by persuading the local legislative body to zone the low-lying land for residence notwithstanding the fact that no one will willingly go there to reside. These arbitrary efforts have sometimes been checked by courts.[3] In like manner land near railroad switch-connections has been zoned to protect neighboring residences although such land was itself unsuitable for residences. The courts have frowned on this practice.[4] In the outlying boroughs of New York City landowners in residential developments have urged residential zoning of nearby localities bordering on railroads because such zoning would tend to protect their own homes. This was quite regardless of the fact that the land near the railroads should be preserved for future industry. It is a serious mistake for a city to zone as residential the land which some day will be needed by industry.

[1] Roos v. Kaul, 302 Ill. 317, 134 N. E. 740 (1922)

[2] N. C.—Elizabeth City v. Aydlett, 201 N. C. 602, 161 S. E. 78 (1931)
Okl.—Baxley v. City of Frederick, 133 Okl. 84, 271 P. 257 (1928)

[3] Ohio—City of Cincinnati v. Struble, 30 Ohio N. P. (N.S.) 380 (1933)
Wis.—Tingley v. Gurda, 209 Wis. 63, 243 N. W. 317 (1932)

[4] U. S.—Nectow v. City of Cambridge (Mass.), 277 U. S. 183, 48 S. Ct. 447 (1928)
Ill.—Tews v. Woolhiser, 352 Ill. 212, 185 N. E. 827 (1933)

The absence of an industrial district does not necessarily cause the zoning map to be unreasonable.[1]

Humanitarian Institutions

When in 1916 the framers of the Greater New York building zone resolution were discussing what buildings and uses should be excluded from residence districts, it did not occur to them that there was the remotest possibility that churches, schools, and hospitals could properly be excluded from any districts. They considered that these concomitants of civilized residential life had a proper place in the best and most open localities.

New York in the beginning had only three use districts—residence, business, and unrestricted. Further segregations were brought about by the height and area regulations. The argument was that a school ought to be where the people resided, and that it could not rightly be forced into a business district where land values are high, traffic congestion is great, noise is always present, and space is needed for merchandising and commerce. Then, too, there is commonly more open space and better access of sunlight in residence districts. To force children to go outside of these districts to schools in a business or industrial locality was out of the question. It was also recognized that churches should be in quiet localities, and as they are so intimately connected with home life they should be in home communities. Neither was there any question that hospitals should be allowed in residence districts because the sick of the community could hardly be thrust into noisy business sections or into industrial districts among factories.

It was apparent, however, that a school, church, or hospital brings certain elements of disadvantage to a home community. Children are noisy and sometimes mischievous, and on this account some families, especially adult families, do not like to live next door to schools. Churches are not only surrounded with parked cars during services, but crowds of people often go to them in front of the private homes, and sometimes private families are disturbed by the practicing of music and the activities of young people. Hospitals likewise have their drawbacks in a home community.

[1] Cal.—Ex parte White, 195 Cal. 516, 234 P. 396 (1925)
N. Y.—Hamlett v. Snedeker, 246 App. Div. 758, 283 N. Y. S. 906 (1935)

Visitors and parked cars are numerous. The delivery of food and materials and the removal of waste approach business proportions. Ambulances are a disturbing factor day and night, and the influence of a hospital is sometimes depressing on the neighborhood. But these objections were met by the simple questions: "Where shall hospitals be built if they are not allowed in a residence district? Shall they be excluded from the district which has the greatest abundance of light and air? Shall they be excluded from the quiet locality? Shall they be restricted to business and industrial districts where there is the maximum of noise and congestion?" There could be but one answer to these questions. Like schools and churches they were allowed in residence districts as a matter of right. At that time the future of zoning was uncertain. No one knew how the courts would look at this novel invocation of the police power. No one thought of it as a cure for all municipal shortcomings and disorders, and the most that was hoped for was that it might bring a fair degree of stabilization in the place of increasing chaos.

The later widespread support of zoning by the courts was the signal for invoking the new discovery for a variety of purposes. Some officials thought that if they could only call their fanciful efforts zoning ordinances the courts would uphold them. Some sought to prevent one-story structures. Others simply transferred private restrictions relating to cost, peaked roofs, and style of architecture into a zoning ordinance, and considered that they had thereby extended for an indefinite time the private restrictions that were about to expire. They overlooked the principle that lawful zoning must be based on the preservation of the public health, safety, morals, and general welfare, and must not be discriminatory.

It became usual to indicate allowable height, area and use districts on a single zoning map, on which were shown three, four, or five kinds of residence districts and certain business and industrial districts. The first residence district would usually be the most open and would be intended for one-family detached homes with large yards; the next would be for similar homes with smaller yards; another would perhaps admit two-family houses or semi-detached houses; in another, apartment houses of medium density

would be allowed, and in the last district apartment houses of maximum density. The variety of the residence districts was a temptation to councils to exclude humanitarian institutions from the most open ones, which inevitably were those of the higher character. It seemed easy enough to bring a certain exclusiveness to such districts by omitting charitable institutions and hospitals from the permitted uses. This practice suited owners of homes in districts affected, and the owners in the other districts did not usually protest, perhaps because they expected to have some uses left open to them that were barred from the districts where the houses had more land. It was difficult, however, to see why hospitals should be forced into congested residence districts by excluding them from the more open ones. To be sure it was not quite so unjustified as forcing these institutions into business or industrial districts. But the proposal was based on a conception that people who lived closer together could more appropriately endure these institutions than people who lived further apart. In other words, institutions that most needed an abundance of open space, light, and air were restricted to districts where the housing congestion was greater. It is evident that such exclusion from the open districts was not based on the public health, safety, morals, and general welfare but upon a desire to employ the new device of zoning to make exclusive districts more exclusive.

It is difficult to escape the conclusion that humanitarian institutions, so far as zoning is concerned, should be allowed in the sunniest, most quiet, and least congested district of a city. This district will usually be the highest-class residence district. If allowed here, they will be allowed in every other district as a matter of course. Exclusion from a district or total exclusion from a city does not mean that these institutions cannot be regulated under zoning. The allowable sizes of yards can properly be made greater than in the case of private dwellings. It is highly desirable that hospitals for contagious diseases should have ample grounds around them. They can also often be screened by trees. When such steps are taken it is of course not because of any danger of contagion, for it is well known that modern hospitals for contagious diseases bring no actual danger into a locality. There is, however, the depressing effect of such hospitals on the surrounding population, if

the hospital and private buildings are close together. There are many illustrations of hospitals for mental diseases or for tuberculosis, placed in ample grounds and provided with landscaped surroundings, that are no injury to the surrounding property. On the contrary they constitute locations that are attractive to substantial one-family detached homes.

Some cities, and also some townships with areas as great as one hundred square miles, have excluded hospitals for contagious diseases entirely. To a certain extent the motives were to keep out institutions that are ordinarily exempted from taxation, but the main reason always was to prevent the depressing effect of these institutions on the surrounding inhabitants. Sometimes it was thought that values were affected. These institutions need to be accessible from cities, both for transportation reasons, and for obtaining the services of specialists. Municipalities in New York state surrounding New York City within fifty miles have been diligent in excluding hospitals for mental cases. About nineteen out of twenty municipalities exclude them today, and if the present tendency continues, they will soon be wholly excluded. To make the matter worse, existing mental hospitals cannot be enlarged without permission of the municipal authorities, and such authorities cannot permit the enlargement contrary to the zoning ordinance.

How can hospitals or institutions for mental diseases be equalized throughout a state so that no municipality shall be compelled to have too much tax-exempt property or to endure the depressing effect of too many institutions of their nature? The answer is that states are increasingly taking over the function of distributing these institutions. This is as it should be. Some statutes provide that the state board of health or the state department of mental hygiene must hold a hearing on the proposed location of a new institution. Then, if the location is meritorious, a state certificate for the location is issued. Too great a burden is not thrown on any one community. So far as the courts have made declarations on the subject, they have tended to uphold state control and disapprove of exclusion by local zoning ordinances.

In 1925 the board of appeals of Denver, against the protest of neighbors, issued a variance for the enlargement of the National

Jewish Hospital for Consumptives.[1] The neighbors took the case to court on the ground that the ordinance prevented the enlargement of a hospital in a residence district and that the board of appeals had no power to make such a variance. The District Court of the city, on July 24, 1925, declared that as a conforming use the hospital had the right to expand on contiguous property owned by it prior to the passage of the zoning ordinance.

The Mineola Home for Cardiac Children contracted to buy a large tract of land for a building, but between the making of the contract and the actual purchase, the village of Irvington, N. Y., in which the tract was located, passed a zoning ordinance placing the tract in district F, from which such a hospital was excluded. The hospital trustees sought to enjoin the village from enforcing the zoning ordinance and claimed that the exclusion was unconstitutional. The court declared in 1925:

The testimony seems to prove that one thing only was considered, namely the desire of certain people to avoid having the defendant as a neighbor. . . . The ordinance in question is invalid, unlawful, arbitrary and unreasonable, and the plaintiff is entitled to judgment restraining its enforcement, with costs.[2]

The city of Pasadena selected a block of land for an isolation hospital in a district zoned against hospitals. Neighbors brought an action to enjoin the city from building the hospital on the ground of violation of the zoning ordinance, and also because it would be a nuisance. Following are quotations from the court opinion rendered in 1926:

It must be conceded that the establishment and maintenance of the isolation hospital was an exercise of the police power of the city. And in this respect the police power of the city is as broad as that possessed by the Legislature itself, subject only to the control of general laws. . . .

At this point it may be noted that the findings of the trial court to the effect that the maintenance and operation of the isolation hospital would constitute a nuisance rest upon two classes of evidence: First, upon the evidence of real estate agents and others

[1] Shackelford v. Denver Board of Adjustment, District Court, Denver (Colo.) Rocky Mountain News, July 25, 1925

[2] Mineola Home for Cardiac Children v. Village of Irvington, Supreme Court, Westchester County, N. Y., January 3, 1925

to the effect that the establishment and maintenance of said hospital upon the chosen site will cause a depreciation in property values of the plaintiffs and others in that vicinity; second, upon the testimony of medical experts that in their opinion there will be danger of the spread of contagious and infectious diseases to residents in the neighborhood thereof such as the danger of infection from insects such as flies, fleas, or mosquitos, or from animals such as rats or other rodents, cats, dogs, or birds, or from children or feeble-minded people wandering into the hospital or into dangerous proximity thereto or from escaping patients, or from possible infection of the clothing of nurses, attendants, or from unknown carriers of disease. Concerning this latter class of evidence it is in our opinion entirely speculative, and amounts to no more than the conclusion of these opinion witnesses that every hospital in which any infectious disorders are treated, regardless of the perfection of its construction and operation in accordance with the most up-to-date principles, methods, appliances, and preventatives, constitutes a menace to public health and a nuisance per se in its relation to dwellers in the vicinity of its proposed location. We cannot subscribe to such a doctrine, since to do so would result in the exclusion of all hospitals treating infectious diseases from cities and other places in the near vicinity of private abode, a conclusion obviously in conflict with the clearest mandates of public policy and the exercise of the police power in relation to public health.[1]

The County Board of Spartanburg County selected a site for a tubercular hospital in the city of Spartanburg. This site was approved by state authority. Thereupon the city council of the city of Spartanburg passed a local ordinance prohibiting the establishment and operation within the limits of the city of any hospital for the treatment of the tubercular. On the claim that the local ordinance was unconstitutional and therefore void the hospital authorities brought an action against the city of Spartanburg to prevent the latter from enforcing the ordinance. In 1928 the Supreme Court of South Carolina, in upholding the hospital authorities, declared:

An ordinance which is repugnant either to the Constitution or general laws is ipso facto void. . . .

When the Legislature enacted the statute authorizing and requiring Spartanburg county to establish and maintain a tubercular hospital, it declared that the establishment and maintenance of

[1] Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225 (1926)

such hospital was not detrimental to the public health, and the city of Spartanburg, therefore, could not by ordinance say that it is, nor can any other city in the state say so by similar ordinance. . . . The Spartanburg General Hospital is a part of the county government, and the Legislature in its wisdom may provide for the establishment of a separate hospital to care for the tubercular, and is authorized so to do by the Constitution of the state. It is a humane act, intending to relieve the suffering and sick from the great "white plague," and the ordinance of the city was passed to prevent what the Legislature had given the petitioners the right to do.[1]

The Cleveland Jewish Orphans' Home owned land in the village of University Heights, Ohio, on which it proposed to build a home for children. A village zoning ordinance prohibited such an institution in the district in which this land was located. After the authorities of the Home were refused a permit by the village commission in charge, they began a court action to prevent the village from enforcing the zoning regulations on the ground that it was unconstitutional. In its decision in 1927, declaring the regulation unconstitutional, the court used the following language:

The planning and zoning commission did not find facts peculiar to the location of appellee's property justifying the denial of its use, but based its action upon financial and social considerations applicable to all parts of the village, as follows: First, that the land would be withdrawn from the tax duplicates, resulting in a loss of assessed values to the city; second, that there would be a larger number of children attending the local school, which would require additional accounting and inspection by the board of education, and might result, notwithstanding the offer of the institution to provide part of the finances for additional school buildings, in an additional outlay for buildings and equipment; and, third, that the public welfare would be further affected, because in the opinion of the commission a school in any community, predominantly attended by the children of a single race, creed, or nationality, is hurtful to the community.

All of these reasons given by the commission for its finding, would be equally applicable to a like use of any other land in the village. They would also apply in certain aspects, but in a lesser degree, to the use of the cottages in question for private schools or by families with large numbers of children of a single nationality or religious

[1] Law v. City of Spartanburg, 148 S. C. 229, 146 S. E. 12 (1928)

faith. . . . We must hold that the restriction as affecting the use intended by appellee is unreasonable. . . .

We do not doubt that the ordinance is a valid enactment in its general aspects, but as applied to this case it is, we think, unreasonable.[1]

The village endeavored to obtain a reversal, by a writ of certiorari in the United States Supreme Court, but that court refused to grant the petition.[2]

The city of Seattle passed a zoning ordinance containing regulations that would make possible the exclusion of a philanthropic home for the aged poor from a residence district. The trustees for the proposed home attacked the validity of the regulations referred to; and after the action underwent various vicissitudes it finally reached the United States Supreme Court. That court declared in 1928 that governmental power to interfere with general rights of landowners by zoning regulations restricting the character of use of property is limited to restrictions which bear some substantial relation to the public health, safety, morals, and general welfare. The regulation in question did not have such a substantial relation and was therefore void.[3] Under the guise of the police power legislatures may not impose unnecessary and unreasonable restrictions on the use of private property in pursuit of useful activities.

The city of Los Angeles sought by zoning regulations to exclude hospitals for the insane and feeble minded from certain open and sparsely settled districts, but allowed them in certain more densely settled districts. The trustees of four sanitariums that were in operation in the forbidden district, either fearing that they would be ousted or foreseeing that they could not build additions, brought an action to test the constitutionality of these regulations. The case reached the District Court of Appeal of the state, which decided in 1930 that a zoning ordinance which permitted the operation of institutions for the insane in thickly populated and densely

[1] Village of University Heights (Ohio) v. Cleveland Jewish Orphans' Home, 20 F. (2d) 743 (1927)

[2] Village of University Heights (Ohio) v. Cleveland Jewish Orphans' Home, 275 U. S. 569, 48 S. Ct. 141 (1927)

[3] Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 (Wash., 1928)

settled districts, while excluding them from comparatively sparsely settled districts, was oppressive, discriminatory, and void.[1]

When the authorities of the town of Woodbury, N. Y., learned that the Jewish Consumptives' Relief Society was about to establish a tuberculosis hospital in an outlying part of the town, they made haste to adopt a zoning ordinance which prohibited a tuberculosis hospital in any part of the town. The court of first resort declared that this was lawful, but the appellate court overturned the decision and held that a tuberculosis hospital could not be excluded from every part of the town under a zoning ordinance. This decision was affirmed in 1931 by the Court of Appeals.[2]

The New York City building zone resolution did not distinguish between public and benevolent institutions on the one hand and institutions of the same nature operated for gain on the other. Subsequent ordinances have sometimes barred the latter institutions from residence districts on the ground that they constitute a form of business. Such exclusion will probably be held to be lawful.[3]

Other court decisions will be found to harmonize with the foregoing discussion.[4]

The apparent consensus of the courts of this country regarding hospitals was interrupted by a decision later than those heretofore cited. The village of Hastings, N. Y., passed a zoning ordinance excluding "insane asylums" from residence districts. A mental health hospital society, organized on a non-profit basis and having state approval, sought to enlarge its buildings. When the necessary permit was refused by the village authorities, the society sought to

[1] Jones v. City of Los Angeles, 286 P. 161, 211 Cal. 304, 295 P. 14 (1930)

[2] Jewish Consumptives' Relief Society v. Town of Woodbury, 230 App. Div. 228, 243 N. Y. S. 686, affd. 256 N. Y. 619, 177 N. E. 165 (1931)

[3] Del.—Mayor and Council of Wilmington v. Turk, 14 Del. Ch. 392, 129 A. 512 (1925)
N. Y.—City of Yonkers v. Horowitz, 222 App. Div. 297, 226 N. Y. S. 252 (1928)

[4] Cal.—San Diego Tuberculosis Ass'n v. City of East San Diego, 186 Cal. 252, 200 P. 393 (1921)
Mo.—Women's Kansas City St. Andrew Soc. v. Kansas City, 58 F. (2d) 593 (1932)
N. Y.—City of Rochester v. Rochester Girls' Home, 194 N. Y. S. 236 (1922)
Cromwell v. American Bible Society, 202 App. Div. 625, 195 N. Y. S. 217 (1922)
Town of Woodbury v. Nicoll, 236 App. Div. 752, 258 N. Y. S. 970, affd. 261 N. Y. 507, 185 N. E. 715 (1933)

compel them to issue it. There was ample space for the new buildings, as the society owned a tract of fifty-two acres, the existing hospital occupying one-eighth of an acre. In 1935 the Court of Appeals refused to compel the issuance of the permit, handing down a brief memorandum as follows:

> The evidence sustains the finding that the institution of the appellant is an asylum for the insane. In the circumstances the zoning ordinance is a valid exercise of authority reasonably conferred for the general welfare.[1]

It is regrettable that the court did not state what the circumstances were on which they based their opinion. The United States Supreme Court refused to hear the appeal from the New York Court of Appeals on the ground that there was not a substantial federal question.[2]

It has been pointed out that a home for the aged is not for all purposes in the same category as a hospital.[3] The question was whether a regulation preventing a garage within two hundred feet of a hospital applied to a home for the aged.

Dumping

The use zoning map of New York City originally showed three kinds of districts—residence, business, and unrestricted. Any lawful use was allowed in the unrestricted districts. So far as zoning regulations are concerned the most objectionable uses—like slaughter houses, fertilizer works, and smelting—are permissible. This is not to say that other local laws may not regulate these highly objectionable uses. Health ordinances controlled the locations of slaughter houses before zoning was established. The courts will enjoin a common law nuisance if located in an unrestricted district just as in a business or residence district. Courts recognize a greater latitude, however, in passing on an alleged nuisance in an unrestricted district. It is the method of operation that constitutes a nuisance. Zoning is not based to any extent on the doctrine of nuisance; a well-drawn zoning ordinance never uses that word.

[1] Jewish Mental Health Society v. Village of Hastings, 268 N. Y. 458, 198 N. E. 30 (1935)

[2] Jewish Mental Health Society v. Village of Hastings (N. Y.), 56 S. Ct. 592 (1936)

[3] Frax Realty Co. v. Kleinert, 123 Misc. 455, 205 N. Y. S. 728 (1924)

It did not occur to the framers of the New York City building zone resolution that it was lawful to use police-power zoning to exclude any use that was necessary or desirable for civilized life. New York City, however, embraced in its five boroughs all sorts of land, and no municipality could be better adapted to furnish suitable locations for all uses whatsoever. It has great tracts of salt meadows in Brooklyn, Queens, The Bronx, and Staten Island. Navigable waterways pierce many regions not desirable for residence. It was no sacrifice for New York City to designate ample districts for industrial uses however undesirable.

As zoning spread to smaller cities and especially to suburban villages, the desire naturally arose to employ zoning to exclude altogether such objectionable uses as fertilizer works, oil refineries, and powder works. Accordingly the zoning regulations of the heavy industrial district in such municipalities often contained a list of uses not wanted and therefore excluded. This practice was undoubtedly justifiable in suburban villages like Scarsdale, N. Y., or La Grange, Ill. Each is part of a metropolitan district which ought to accommodate all lawful uses, but they themselves being purely residential can reasonably exclude from their borders these objectionable industries.

The practice of employing zoning to exclude from a municipality a use which it does not want but which in fairness it ought to accommodate has gained the name of dumping. For instance, where a village by zoning excludes from its confines a garage, a blacksmith shop, or a laundry, the objectionable establishments are compelled to locate in adjoining towns or villages.

Up to this time the courts have not had occasion to pass on the lawfulness or unlawfulness of specific instances of dumping. But cases are sure to arise. If a town can exclude all public garages, for example, the adjoining town by the same token can do the same. A point will necessarily be arrived at where some landowner having a suitable site will demand a garage permit, and on its refusal will obtain an order of mandamus to compel its issue. This will squarely raise the question whether a regulation is reasonable which forces public garages into adjoining towns. Courts will probably hold that each municipality should be willing to allow these objectionable but necessary uses within its confines, wherever there are

suitable locations for them; and if it refuses, in pursuance of a selfish zoning ordinance, the court will interfere.

The unfairness of selfish zoning will become apparent if every municipality in a state should exclude some particularly objectionable use. However, if it is lawful for one to do it, it is lawful for all. If the zoning ordinance of a municipality is held lawful because lawfully passed, regardless of its effect on other municipalities, then all similar regulations in the state must be held lawful. Thus the particular use, which is necessary but objectionable, would be driven to other states. Although this *reductio ad absurdum* is not likely to happen, it shows that courts cannot allow municipalities to regard only their own preferences. Courts will probably take into account the size and geography of cities, and will to some extent regard a metropolitan region as a unit for the purpose of permitting all lawful uses in suitable locations. Zoning regulations must not only be reasonable, but municipalities must not be unreasonably selfish in excluding their share of unwanted uses. Instances of excluding such uses are the prohibitions already referred to (page 73) of mental and tuberculosis hospitals near large cities. Intolerable situations are sure to arise if the courts do not pronounce these and similar exclusions unreasonable.

Problems of Use Districts

In adjusting the boundaries of use districts difficult situations have arisen where it is desired to zone one side of a street for residences and the other side for business. Offhand one would say that both sides should be in the same district. But sometimes prior to zoning a residential development has included one side of the street and not the other. Substantial homes have already been built on one side, protected by private restrictions. Later perhaps a surface car line has been operated on the street, and there is logical demand for stores on the other side. In such a case there is temptation to zone one side of the street for residences and the other for business. Sooner or later some home on the residence side will become dilapidated and the owner will seek to obtain a building permit for a store. Courts are reluctant to hold that one side of a street can be retained indefinitely as a residence zone while the other side is zoned and occupied for business.

The zoning of corners has also caused difficulty in this regard. If in a locality mostly residential three opposite corners are occupied by stores, the courts are likely to declare that it is not justifiable to zone the fourth corner so as to prevent a store. The invasion of the residence side of the street by the first one or two stores is most harmful to the residential developments in the rear. The injury to the residences may far outweigh the advantage of the new stores to the landowner. It must be admitted, however, that the courts have everywhere shown an inclination to set aside residence zoning where the opposite side of the street is actually built up with stores and zoned as business. Broad streets may now and then justify an exception to this inclination of the courts. Where the street has a great deal of traffic, the courts are more inclined to hold that both sides should be open to business.[1]

Some people have considered that residence districts should exclude all profit-making enterprises.[2] It was never the intention of zoning to make districts exclusively residential, but rather that residences should be protected against harmful uses. The New York City building zone resolution did not exclude private schools although they might be operated for profit. Similarly, accessory uses—such as a doctor's or lawyer's office—are permitted in residence districts. The name of a district does not denote that nothing is allowed therein except that particular use. One city may allow more uses in a residence district than another. The question is whether such uses harmonize with the residential character, so as not to result in preventable injury.

The same too literal interpretation causes many persons to

[1] Cal.—Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537 (1928)
Ill.—Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767 (1932)
Lind v. City of Rockford, 354 Ill. 377, 188 N. E. 446 (1933)
Kan.—Hoel v. Kansas City, 131 Kan. 290, 291 P. 780 (1930)
Mich.—City of Pleasant Ridge v. Cooper, 267 Mich. 603, 255 N. W. 371 (1934)
N. Y.—Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931)
Isbister v. Isbister, Supreme Court, Westchester County, May 8, 1925, 215 App. Div. 838, 213 N. Y. S. 826 (1926)
Isenbarth v. Bartnett, 206 App. Div. 546, 201 N. Y. S. 383, affd. 237 N. Y. 617, 143 N. E. 765 (1924)
Ohio—Mehl v. Stegner, 38 Oh. A. 416, 175 N. E. 712 (1930)
Pa.—Taylor v. Haverford Tp., 299 Pa. 402, 149 A. 639 (1930)

[2] York Harbor Village Corporation v. Libby, 126 Me. 537, 140 A. 382 (1928)

consider that a business district is for business and nothing else. As a matter of fact residences can be erected as freely in such districts as stores. A business district is usually no more than a district from which industries are excluded. Before a municipality is zoned every part is equivalent to an unrestricted or industrial district. The parts that are declared to be business districts are more protected than they were before, because new industries are excluded.

It cannot be denied that municipalities of all sorts, especially towns, have been prone to place too much street frontage in business districts. In some towns one hundred times as much street frontage has been placed in business districts as is likely to be used for business purposes in two generations. The reason usually is that the main streets or highways are important traffic arteries with occasional shops and stores, and more often with occasional garages and gasoline stations. New private homes are not attracted. They are inclined to seek locations slightly removed from the main traffic arteries. Landowners on the traffic streets—on the sides zoned for residences—not being able to sell for residence purposes, naturally desire to keep their land available for both residences and business, and on this account they petition the authorities to place both sides of their street in business districts. It cannot be said that courts have shown any criticism of this generosity toward such districts. Every municipality is fortunate that can with fairness to property owners reduce its business districts to its reasonable prospective needs for business because it is better not to have residences and stores intermingled.

It is usually to the advantage of owners of portions of main thoroughfares that are suitable for residences, to have such portions zoned as residential. If zoned for business there will be few buyers. The land may never be needed for business, but buyers of residence locations will avoid it because of the danger that a store or filling station may be erected on one of the adjoining lots.

The increase of freeways, which are thoroughfares to which the abutting owners have no right of direct access, will help to solve the problem of too extensive business districts along main arteries. Business districts will be placed on transverse and parallel streets.

It has been declared unreasonable to change a single lot from residence to business.[1]

Where a zoning regulation prohibits a change of use, this must usually be regarded as prohibiting a change to another grade of use. For instance, in a single ordinance the uses allowed in a residence district are of one grade. Similarly in a business district the allowable stores are of the same grade. A change from a grocery store to a hardware store is not a prohibited change of use. Some ordinances have gone too far in this regard and have endeavored to require an additional permit when such a change is made. This is a mistake because it injures rentability.

The use of a building may depend upon its purpose as shown by its form and construction.[2] Thus a building constructed for a store and having a plate glass front might have been occupied by a family as their home pending rental as a store. Then on the adoption of an ordinance it may be included in a residence district. Although it never has been used for a store and has actually been used as a residence, it would become a lawful nonconforming building on the principle that its business character, as shown by its form and construction, had existed from the beginning.

Different Kinds of Business and Industrial Districts

In most states the simple establishment of a business district, in which business and residences are permitted, and an industrial district in which industry, business, and residences are permitted has not afforded sufficient segregation. Some industry, especially light industry, must be permitted in every business district. The clothing store must have a repair department. The jeweler must set rings and repair watches. The shoe store must repair shoes. Cities are likely to consider that a large amount of light industry

[1] N. J.—Guaranty Const. Co. v. Town of Bloomfield, 11 N. J. Misc. 613, 168 A. 34 (1933)
Linden Methodist Episcopal Church v. City of Linden, 113 N. J. L. 188,173 A. 593 (1934)

[2] N. Y.—Town of Islip v. Newton, Supreme Court, Suffolk County, New York Law Journal, November 10, 1933
Knickerbocker Ice Co. v. Sprague, 4 F. Supp. 499 (1933)
Wohl v. Leo, 109 Misc. 448, 178 N. Y. S. 851, affd. 201 App. Div. 857, 192 N. Y. S. 945 (1922)
Pa.—Haller Baking Co.'s Appeal, 295 Pa. 257, 145 A. 77 (1928)

must be permitted in business districts. The regulations of a district for general business in some cities are about the same as those for a light industry district in others. The classes of districts that have been favored are local business districts for shopping in residential localities, downtown business districts, sometimes called commercial districts, where buildings can be higher and nearer together, merchandising districts—such as those inaccurately called retail districts in Greater New York—from which industry is almost entirely excluded, light industry districts, and heavy industry districts. No two cities are exactly alike in their needs for these districts. A manufacturing city differs from a suburban residential city. A seaport differs from a mining town.

Candy stores making their own candy, bakeries making their own products, and hand laundries are usually allowed in local business districts. But it early became evident that large factories for these purposes could not properly be allowed in these districts because they were tantamount to industry. Accordingly the custom arose of limiting the number of horse power of the machines or the number of workers, or in the case of laundries allowing a limited number of hand workers only. In the main such provisions have been successful and have given rise to almost no litigation.[1]

Some cities have applied fanciful exclusions to business districts in an effort to make certain portions of their business streets of a higher character. For instance, some have excluded wholesaling of merchandise. It is hard to see how wholesaling is more injurious than retailing. In some districts enumerated articles of merchandise can be sold, and no others. These segregations based on preferences and exclusiveness are out of place in a zoning plan. Doubtless, however, the segregation of stores selling food products from stores selling other kinds of merchandise would be upheld by the courts because food products cause refuse and attract insects more than dry goods, hardware, and office business.

Some municipalities have established modified business districts in which stores are allowed on the ground floor of buildings but only residences above. It is difficult to see what justification there is for this practice under the police power. The floor above a store

[1]City of New Rochelle v. Blossom Cleaners & Dyers, Inc., City Court, New Rochelle, N. Y., Westchester Law Journal, October 17, 1933

is open to all the dangers and drawbacks of the store use. A fire in the store endangers the floor above. If food products are sold in the store, the floors above are subjected to the dangers of flies and other insects. This method of zoning has not become so prevalent that cases have found their way into court, but it is an attractive form of zoning often favored by the property owners who hope to rent the first floors for stores and yet preserve a certain amount of exclusiveness for the apartments above. It has generally been considered that a residence district should be all residence from the lowest to the topmost floor of its buildings, and that a business district should at least be open to business to the same extent. As far as possible it is well to segregate residential uses from business and industrial uses.

Density of Population

Although the segregation of dwellings according to the number of families is recognized by the courts as lawful, yet this segregation does not necessarily have any relation to density of population. Some multi-family houses are smaller than some one-family houses. The number of families does not measure the size of the building, and therefore does not necessarily measure the density of population. In states where the enabling act authorizes zoning for density of population the practice has increased of providing a density regulation for each district and especially for each residential district.[1] This may be done by stating the allowable number of families per acre of land. No prospect of trouble arises in reducing the allowable number to three or four families per acre. It is not difficult to show the court that such a regulation has a substantial relation to fire risk, light and sunlight, circulation of air, annoyance from noise, and danger of contagion. The substantial relation ceases, however, when unnecessarily large building plots are required. The question sometimes arises whether these density regulations can be used to preserve the surroundings of large estates

[1] Ill.—Bjork v. Safford, 333 Ill. 355, 164 N. E. 699 (1929)
N. J.—Nelson Bldg. Co. v. Greene, 5 N. J. Misc. 331, 136 A. 503 (1927)
N. Y.—Barker v. Switzer, 209 App. Div. 151, 205 N. Y. S. 108 (1924)
MacEwen v. City of New Rochelle, 149 Misc. 251, 267 N. Y. S. 36 (1933)
R. I.—City of Providence v. Stephens, 47 R. I. 387, 133 A. 614 (1926)
Richard v. Zoning Board of Review, 47 R. I. 102, 130 A. 802 (1925)

by preventing the building of nearby houses on comparatively small lots. For instance, a regulation requiring two acres for each family might be a protection to surrounding large estates, but in case of a lawsuit could the municipality show that a house for one family on two acres of land contributed to the safety and health of the community to a greater degree than such a house on one acre of land? Three families to the acre is safe. Beyond that is doubtful. Some point still beyond that is unlawful for the reason that there is no substantial relation between the regulation and the health and safety of the community.

Instead of limiting the number of families per acre there may be a requirement as to the number of square feet of lot per family. Both methods are controlled by the same legal principles. A specified minimum number of square feet of floor space per family is lawful where there is a density authorization in the state enabling act. Similarly a minimum number of lineal feet of street frontage per family may be lawfully established.

It is true that families may vary greatly in size, but no better way has been found of regulating density of population than by limiting the number of families occupying a given area. It is a practical method of attaining the object desired and has the added advantage of requiring construction features, such as cooking or laundry equipment, which show the examiner of the plans the use and density intended.

It is important, however, that the ordinance contain a definition of a family, otherwise the court will stand by the dictionary definition which is unsatisfactory for this purpose.[1] The substance of the definition should be that the word means two or more people living together as a single housekeeping unit and using one cooking outfit only.

Interim Ordinances

The term interim zoning is applied to a quickly prepared ordinance, without a map, designed to preserve the status quo until complete regulations with a map can be established.[2] Such ordi-

[1] Village of Riverside v. Reagan, 270 Ill. A. 355 (1933)

[2] Iowa—Downey v. Sioux City, 208 Iowa 1273, 227 N. W. 125 (1929)
La.—Dickson v. Harrison, 161 La. 218, 108 S. 421 (1926): "What makes the ordinance objectionable is that it prescribes no uniform rule of action,

Footnote continued on page 88.

nances are not to be encouraged. If enforced they usually result in unfairness to property owners and often delay or embarrass the adoption of a comprehensive and non-discriminatory plan. The defect of all interim ordinances is that their districts are so ill-defined and their regulations are so general that a large proportion of the requirements are unreasonable in their application to specific lots.[1] Citizens and even courts may endure them for a short time but they produce excessive litigation while they last and cause disputes which are likely to prevent a later harmonious arrangement of districts. One of the favored methods of this sort of regulation is to provide that no store or factory shall be built unless the owners within a certain distance consent.[2] Another is that no store or factory shall be built where the majority of buildings within a certain number of feet from the proposed site are dwellings.[3] Sometimes a provision is added that a store or factory shall not be erected unless a certain fraction of the surrounding owners consent

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Footnote continued from page 87.

applicable to all similarly situated, under which the council is to act in granting or withholding permits, but leaves it to the whim and fancy of the council to grant or withhold them. In our opinion the ordinance, because of this objectionable feature, which we think affects it in its entirety, is unconstitutional."

N. J.—Levy v. Mravlag, 96 N. J. L. 367, 115 A. 350 (1921)
N. Y.—Kensington-Davis Corp. v. Schwab, 239 N. Y. 54, 145 N. E. 738 (1924)
Longley v. Rumsey, 130 Misc. 492, 224 N. Y. S. 165 (1927)
City of Olean v. Conkling, 157 Misc. 63, 283 N. Y. S. 66 (1935)
In re Russell, 158 N. Y. S. 162 (1916)
Ohio—Cahn v. Guion, 27 Oh. A. 141, 160 N. E. 868 (1927)
Srigley v. Woodworth, 33 Oh. A. 406, 169 N. E. 713 (1929)
Okl.—McCurley v. City of El Reno, 138 Okl. 92, 280 P. 467 (1929)
Va.—Downham v. City Council of Alexandria, 58 F. (2d) 784 (1932)

[1] Ark.—Herring v. Stannus, 169 Ark. 244, 275 S. W. 321 (1924)
City of Little Rock v. Pfeifer, 169 Ark. 1027, 277 S. W. 883 (1925)
Cal.—Andrews v. Barrett, 100 Cal. A. 801, 281 P. 79 (1929)
Andrews v. City of Piedmont, 100 Cal. A. 700, 281 P. 78 (1929)
Wickham v. Becker, 96 Cal. A. 443, 274 P. 397 (1929)
La.—Dickason v. Harris, 158 La. 974, 105 S. 33 (1925)

[2] Cal.—City of Stockton v. Frisbie & Latta, 93 Cal. A. 277, 270 P. 270 (1928)
Ill.—Deitenbeck v. Village of Oak Park, 331 Ill. 406, 163 N. E. 445 (1928)
Roos v. Kaul, 302 Ill. 317, 134 N. E. 740 (1922)
Troy v. Village of Forest Park, 318 Ill. 340, 149 N. E. 281 (1925)
Ky.—Cayce v. City of Hopkinsville, 217 Ky. 135, 289 S. W. 223 (1926)

[3] Ariz.—City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 P. 923 (1928)
Ky.—Fowler v. Obier, 224 Ky. 742, 7 S. W. (2d) 219 (1928)
Kirkwood Bros. v. City of Madisonville, 230 Ky. 104, 18 S. W. (2d) 951 (1929)

in writing.[1] The courts have usually but not always pronounced these methods unreasonable and unlawful.[2] A better type of interim ordinance will name certain streets for business, certain other streets for industry, and declare that the remainder of the municipality is residential. This wholesale method of zoning nearly always prevents a lawful building in some forgotten spot or prevents the lawful extension of an existing building.

Interim ordinances that prohibit nonconforming uses within certain distances of other buildings are always hastily put together, are arbitrary in most of their provisions, and are not likely to be upheld by courts.[3]

State enabling acts usually require a municipality to appoint a zoning commission to prepare the ordinance, make a preliminary report and later a final report to the local legislature, holding public hearings at different stages of progress. These requirements have done much to prevent interim ordinances.[4] Interim ordinances have puzzled courts. Local preferences and prejudices have affected local court decisions on these irrational plans and have prevented the growth of fixed rules for the sanction of such ordinances.

[1] Iowa—City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N. W. 823, 188 N. W. 921 (1922)
Marquis v. City of Waterloo, 210 Iowa 439, 228 N. W. 870 (1930)

[2] Cal.—Lima v. Woodruff, 107 Cal. A. 285, 290 P. 480 (1930)
Miller v. Board of Public Works of Los Angeles, 195 Cal. 477, 234 P. 381 (1925)
Fla.—Skillman v. City of Miami, 101 Fla. 585, 134 S. 541 (1931)
Ill.—Koos v. Saunders, 349 Ill. 442, 182 N. E. 415 (1932)
Ky.—McCown v. Gose, 244 Ky. 402, 51 S. W. (2d) 251 (1932)
Mass.—Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N. E. 262 (1924)
Minn.—Eha v. Bundlie, District Court, Second Judicial District, Ramsey County, St. Paul, July 23, 1931
N. Y.—Ballard v. Roth, 141 Misc. 319, 253 N. Y. S. 6 (1931)
Coley v. Campbell, 126 Misc. 869, 215 N. Y. S. 679 (1926)
City of Glens Falls v. Standard Oil Company, 127 Misc. 104, 215 N. Y. S. 354 (1926)
In re Russell, 158 N. Y. S. 162 (1916)
City of Utica v. Hanna, 202 App. Div. 610, 195 N. Y. S. 225 (1922)
Pa.—Perrin's Appeal, 305 Pa. 42, 156 A. 305 (1931)

[3] Cal.—City of Stockton v. Frisbie & Latta, 93 Cal. A. 277, 270 P. 270 (1928)
Ill.—Roos v. Kaul, 302 Ill. 317, 134 N. E. 740 (1922)
Troy v. Village of Forest Park, 318 Ill. 340, 149 N. E. 281 (1925)
Ky.—Cayce v. City of Hopkinsville, 217 Ky. 135, 289 S. W. 223 (1926)

[4] Kramer v. Schwartz, 336 Mo. 932, 82 S. W. (2d) 63 (1935)

Piecemeal Ordinances

Piecemeal zoning has not been favored in practice. Without knowing where the courts would draw the line municipalities have usually kept on the safe side by zoning all the land within their boundaries. And yet in the zoning of Greater New York, although all the terrain was zoned on the height and area maps, large territories were left undetermined on the use map. These were in Jamaica Bay, southern Staten Island, and the Bronx, where streets were not shown on the official map and development was not sufficient to point the way for adaptation to the future. Much of this territory has since been definitely zoned on the use map.

It should be added that in the early maps use districts were designated by markings within streets. If there were no streets (as was the case in these outlying territories) the use districts could not be shown. This awkward method of designation was abandoned after a few years, and districts regardless of streets were indicated by hatching.

In towns that have several populous community centers, none of them incorporated, the question arises whether one community can be zoned and the others left unzoned. The well-known block-ordinance decisions in St. Louis and Chicago, where piecemeal zoning was declared void, served to warn early practitioners in zoning to avoid the charge that land in the same municipality that was situated alike was partly zoned and partly unzoned.[1] However, there is little likelihood that courts will hold that a zoning plan is void because some portion of the municipality is omitted. Populous portions having streets or highways present a situation justifying their regulation whereas unpopulated and undeveloped portions may not.[2] It would be improper and probably unlawful for a town

[1] Ill.—Friend v. City of Chicago, 261 Ill. 16, 103 N. E. 609 (1913)
Kan.—Julian v. Golden Rule Oil Co., 112 Kan. 671, 212 P. 884 (1923)
Mass.—Kilgour v. Gratto, 224 Mass. 78, 112 N. E. 489 (1916)
Mo.—City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094 (1897)
N. J.—Aitken v. Borough of Hasbrouck Heights, 136 A. 802 (1927)
Ohio—City of Youngstown v. Kahn Bros. Bldg. Co., 112 Oh. St. 654, 148 N. E. 842 (1925)

[2] Fla.—Henry v. City of Miami, 117 Fla. 594, 158 S. 82 (1934). The minority opinion seems the better.
La.—Dickson v. Harrison, 161 La. 218, 108 S. 421 (1926)

Footnote continued on page 91.

to zone one of its less populous communities and leave a more populous community unzoned. Some officials have proposed that zoning be applied to a part of their municipality, and extended from time to time as owners petition and as the experiment shows how to improve. No method could be more hazardous than this. Lawsuits would be inevitable and a comprehensive and coördinated zoning plan would be less attainable each year.

Discrimination

Regulations must recognize the effect of structures lawfully erected before zoning began.[1] An early decision in Illinois produced consternation throughout that state and the Middle West because if followed it would have overthrown all zoning. It held that if existing nonconforming buildings and uses were allowed to remain, the prohibition of similar buildings and uses was discriminatory and unconstitutional.[2] This doctrine has long been superseded even in Illinois, and it is held in all states that it is lawful to allow existing buildings to continue without jeopardizing the regulations regarding new buildings. Zoning is designed to protect the future and at the same time deal reasonably with buildings already lawfully in existence. In Greater New York, before zoning was adopted in 1916—and especially in the Grand Central and downtown districts of Manhattan—there were buildings of excessive height on the street line. Some occupied their entire lot areas. These localities were designated "two" and "two and one-half times districts" on the height map, and "B districts" on the area map, not because the limits so established were the best adapted to the health, safety, and general welfare of the community but because there was danger that the courts would declare more drastic regulations discriminatory and therefore unreasonable and void. Courts will undoubtedly uphold

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Footnote continued from page 90.

N. Y.—Harris v. Village of Dobbs Ferry, 208 App. Div. 853, 204 N. Y. S. 325 (1924)
Hayden v. Clary, Supreme Court, Onondaga County, January 6, 1922
Ohio—Feiss v. City of Cleveland, Court of Common Pleas, Cuyahoga County, September, 1924, Baltimore (Md.) Daily Record, January 1, 1925

[1] La.—Boland v. Compagno, 154 La. 469, 97 S. 661 (1923)
Giangrosso v. City of New Orleans, 159 La. 1016, 106 S. 549 (1925)
Sampere v. City of New Orleans, 166 La. 776, 117 S. 827 (1928)

[2] Roos v. Kaul, 302 Ill. 317, 134 N. E. 740 (1922)

ordinances that require somewhat better standards than existing buildings, but will not approve standards which render new buildings economically impossible. A new village with no building higher than two stories might well expect the courts to uphold an ordinance making a two-story height limit. The village would probably show on the trial that the village was in less danger from fires if high buildings were not allowed and that its fire-fighting apparatus was not adapted to the protection of high buildings.

As a rule both sides of a street should be in the same kind of district,[1] but where one or both sides were entirely built up before zoning, and varying conditions were in existence, the courts have sometimes upheld regulations which continue for one side of a street the more restricted conditions already established there.[2]

The question sometimes arises whether a municipality must harmonize its zoning districts at the boundary line of another municipality with the buildings and uses existing in the latter area. Political boundaries should not prevent adaptation.[3] As zoning is based on the police power, and the environment must in all cases be recognized, the neighboring structures and uses must have the same effect as if they were in the municipality that is being zoned. When the land in the neighboring municipality is vacant the municipality adopting an ordinance may properly allow its own needs to control. But the mere fact that the neighboring municipality has adopted an ordinance does not compel the newly-zoned municipality to harmonize its districts with those of the other if no buildings have been erected there. In other words, it is existing buildings and uses that should be the basis of determination and not the mere existence of districts. It may happen that the districts will be changed before structures are built.

When the New York City building zone resolution was framed there were many regulative laws and ordinances in existence like those relating to tenement houses and factories. In some cases the new zoning regulations were less restrictive than existing laws and in some cases more restrictive. To prevent confusion, and to make

[1] See cases cited under Problems of Use Districts, p. 81

[2] Cal.—Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537 (1928)
N. Y.—Maloff v. Kimmey, Supreme Court, Onondaga County, April 2, 1931

[3] See Dowsey case, p. 82; also Townsend's Pet., 21 Pa. Dist. & Co. 340 (1933)

sure that a zoning regulation would not be employed to weaken existing laws on the principle that it was a later enactment, it was provided that the more restrictive rule should be in force. This provision has been followed almost universally throughout the country.[1]

Local legislative bodies are sometimes intrigued into the view that because they have the power to zone they can discriminate in favor of or against given areas, regardless of the principle that land situated alike should be zoned alike. Courts have rather uniformly declared that such discrimination is unlawful.[2]

Nuisance

Zoning is not based on the doctrine of common-law nuisance. Good zoning enabling acts and ordinances do not even use the word nuisance. Nevertheless a prohibited use is sometimes a nuisance, and sometimes a permitted use is a nuisance. Zoning regulations and common-law nuisances are based on different legal principles; they never conflict with each other if the underlying differences are kept in mind. There are cases, however, where a neighbor in enjoining a nonconforming use will allege that it is also a nuisance. Thus inevitably court decisions have treated the subject of nuisance along with zoning regulations, but the opinions nearly always make it clear that the nuisance is one thing and the violation of the zoning regulation another.[3] If zoning had been based on the doctrine of

[1] Thorofare Developing Corp. v. Deegan, 134 Misc. 592, 235 N. Y. S. 544, affd. 226 App. Div. 871, 235 N. Y. S. 898 (1929)

[2] Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)
N. J.—Fischer v. Borough Council of South Toms River, 181 A. 630 (1935)
Wis.—Piper v. Ekern, 180 Wis. 586, 194 N. W. 159 (1923)
Schwahn v. City of Eau Claire, Circuit Court, Eau Claire County, June 24, 1929

[3] Cal.—Eaton v. Klimm, 217 Cal. 362, 18 P. (2d) 678 (1933)
Fendley v. City of Anaheim, 110 Cal. A. 731, 294 P. 769 (1930)
Vowinckel v. Clark & Sons, 216 Cal. 156, 13 P. (2d) 733 (1932)
Conn.—Nailor v. C. W. Blakeslee & Sons, Inc., 117 Conn. 241, 167 A. 548 (1933)
Ind.—Albright v. Crim, 97 Ind. A. 388, 185 N. E. 304 (1933)
Kan.—Fink v. Smith, 140 Kan. 345, 36 P. (2d) 976 (1934)
Mass.—Beane v. H. K. Porter, Inc., 280 Mass. 538, 182 N. E. 823 (1932)
Marshall v. Holbrook, 276 Mass. 341, 177 N. E. 504 (1931)
Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N. E. 254 (1933)

Footnote continued on page 94.

nuisance it would not have been effective, and in its broader aspects it would not have been upheld by courts. A good zoning plan for a city furnishes harmonious regulations for every part so that the whole conserves the health, safety, morals, comfort, convenience, and general welfare of the whole community. To accomplish this purpose the incidence of the regulations on every lot should have a substantial relation to these bases of the police power. Clearly a book store is not a nuisance, but if such a store is permitted in a residence district a myriad of similar uses must be permitted; otherwise there would be unfair discrimination. Business districts bring increased crowds, greater street traffic, and more noise. Hence they are reasonably segregated from residence districts, whether or not any one building or use constitutes a nuisance. Moreover, the zoning plan affords a basis for the issue of building permits, thus assisting in the harmonious upbuilding of the city, while it is the manner of operating an existing building or use that usually constitutes a nuisance.

Certain extremely harmful uses, when they are out of place, are considered by the courts to be nuisances per se; in such cases the erection of the building or the beginning of the use will be enjoined. These cases usually arise in cities that are not zoned. They are nearly always full of uncertainty and difficult for the courts. A

Footnote continued from page 93.

N. J.—Francisco v. Department of Institutions and Agencies, 13 N. J. Misc. 663, 180 A. 843 (1935)

N. Y.—Arthur v. Virkler, 144 Misc. 483, 258 N. Y. S. 886 (1932)
Bove v. Donner-Hanna Coke Corp., 142 Misc. 329, 254 N. Y. S. 403, 236 App. Div. 37, 258 N. Y. S. 229 (1932)
Haber v. Paramount Ice Corp., 239 App. Div. 324, 267 N. Y. S. 349, 264 N. Y. 98, 190 N. E. 163 (1934)
Keenly v. McCarty, 137 Misc. 524, 244 N. Y. S. 63 (1930)
People v. Cuneo Eastern Press, 257 N. Y. 208, 177 N. E. 422 (1931)

Ohio—Salvation Army v. Frankenstein, 22 Oh. A. 159, 153 N. E. 277 (1926)

Pa.—Franklin Street Methodist Episcopal Church v. Crystal Oil & Gas Co., 309 Pa. 357, 163 A. 910 (1932)
White v. Old York Road Country Club, 185 A. 316 (1936)
Yeager v. Traylor, 306 Pa. 530, 160 A. 108 (1932)

Tex.—City of Austin v. Nelson, 45 S. W. (2d) 692 (1931)
Harvey v. City of Seymour, 14 S. W. (2d) 901 (1929)
City of Wichita Falls v. Continental Oil Co., 5 S. W. (2d) 561, 42 S. W. (2d) 236 (1931)

Utah—Salt Lake City v. Western Foundry & S. R. Works, 55 Utah 447, 187 P. 829 (1920)

zoning plan will prevent this dangerous and unsatisfactory litigation.[1]

Boundaries of Districts

Boundaries of districts should ordinarily be a standard distance from the street line. In New York City this distance is one hundred feet. In municipalities having deeper lots the distance may be one hundred and fifty feet or even two hundred feet. Boundary lines in the center of streets usually make trouble because courts are always likely to consider that regulations on both sides of a street should be the same.

Land surveyors often like to make the boundary line follow rear lot lines. This is a mistake. A boundary line between districts should be a straight line usually parallel with a street. The first impression of the map maker is that, if the boundary line does not follow the rear lot lines, there will be trouble because a single lot will be in two zoning districts. As a practical matter this result is neither dangerous nor even inconvenient. If the boundary line is one hundred feet from the street line, and some particular lot is one hundred and fifty feet deep, the board of appeals will always assist the owner to make some reasonable use of his entire lot. Sometimes it will grant a variance to the effect that the business building on the front of the lot can extend into the residence district in the rear, subject to conditions that will protect the neighboring homes. No case seems ever to arise that cannot be reasonably adjusted by the board of appeals. On the other hand, the practice of making boundary lines follow rear lines of lots is most unfair and harmful. The owner of a lot of unusual depth can erect a building that will injure conforming buildings in the rear. For instance, if the boundary of a business district is in the rear of one-hundred-foot lots, but some exceptional lot is one hundred and fifty feet deep, a district boundary which follows the rear lot lines would allow the owner of the deep lot to erect a business building that would extend into the residence district in the rear and injure many homes. Moreover, if the boundary follows rear lot lines, the owners of average depth lots are discriminated against

[1] Mass.—Polish Political Club v. Cloper, 260 Mass. 559, 157 N. E. 705 (1927)
N. Y.—Haber v. Paramount Ice Corp., 239 App. Div. 324, 267 N. Y. S. 349, 264 N. Y. 98, 190 N. E. 163 (1934)

because the mere fact of ownership will cause a neighboring lot of unusual depth to be available for a larger or higher building that will pocket or injure the buildings on lots of normal depth. If the boundary is a straight line parallel with the street, sales will gradually be made that will tend to conform the lot line to the district boundary.

All boundary lines are more or less arbitrary, but if laid out with reasonable fairness, the courts will uphold them.[1]

An indefinite location of boundary lines is perhaps the most troublesome of all boundary mistakes. Sometimes, for example, the location of the line is left to a board of appeals in the expectation that it will decide, as each case arises, where the boundary is. As a matter of fact the courts have never allowed a board of appeals to make that determination. The fixing of the boundary line is a legislative act, and the local legislative body, not the board of appeals, must determine it.[2] Where ordinances provide that the board of appeals shall have this power it is the court that by interpretation fixes the line, and not the board of appeals.

The center or either border of a railroad right of way often constitutes an appropriate boundary line. Railroad land, however, should always be placed in one district or the other because the railroad is likely to part with the title to the land, and the new owner may obtain a permit for a harmful structure. Sometimes the railroad itself will erect a harmful structure if its land is not zoned to harmonize with the neighborhood.[3]

It is bad practice to describe boundaries of districts in the body of the ordinance instead of making a zoning map part of the ordinance. The mapping method forces the drafter to define all land areas. Corners are always difficult. Waterways, isolated lots, and unusual block shapes give rise to litigation if there is doubt as to the district intended. If, however, the boundaries are fixed by the terms of the ordinance instead of by a map, it is almost inevitable that serious omissions or double meanings will occur. Then, too, amend-

[1] In re Dawson, 136 Okl. 113, 277 P. 226 (1928)

[2] Mass.—Nelson v. Town of Belmont, 274 Mass. 35, 174 N. E. 320 (1931)
N. Y.—Wertheimer v. Schwab, 124 Misc. 822, 210 N. Y. S. 312 (1925)

[3] N. Y.—Joleto Construction Corp. v. Walsh, 223 App. Div. 764, 228 N. Y. S. 282 (1928)
Okl.—McCurley v. City of El Reno, 138 Okl. 92, 280 P. 467 (1929)

ments of maps by pasters can be easily made, but the wording of the ordinance cannot usually be amended without introducing circuitous and long-drawn-out provisions.

Esthetics

Courts make no objection to the recognition of esthetic purposes in zoning regulations if the regulations are based on considerations of health, safety, morals, comfort, convenience, and the general welfare of the community.[1] As a general rule, however, zoning regulations may not be based on esthetic considerations.[2] A zoning regulation controlling the color or the architectural style of buildings would not be upheld today by the courts. On the other hand so many qualities are closely connected with the health, safety, and convenience of the community that police-power regulations of great scope will be increasingly upheld. Quiet and the presence of natural surroundings and even vegetation, on account of its production of oxygen, may be important elements in preserving health.[3] Considerations of light and air affect the health of the community and enter into the making of lawful zoning regulations. In so far as other amenities accomplish the same result, they too will increasingly be recognized. It has been said that beautiful architecture is in the same way conducive to health, or at least to comfort and well-being. If all people were alike in taste, this might be true. But even architectural experts differ as to what they consider examples of good taste. *De gustibus non est disputandum* is as true today as it was two thousand years ago. Our courts, compelled as they are to pass on the reasonableness of police-power legislation,

[1] U. S.—Welch v. Swasey, 214 U. S. 91, 29 S. Ct. 567 (Mass., 1909)
La.—Civello v. City of New Orleans, 154 La. 271, 97 S. 440 (1923)
Mass.—Ayer v. Cram, 242 Mass. 30, 136 N. E. 338 (1922)
Opinion of Justices, 234 Mass. 597, 127 N. E. 525 (1920)
Ohio—Kahn Bros. Co. v. City of Youngstown, 25 Ohio N. P. (N.S.) 30 (1924)
City of Youngstown v. Kahn Bros. Bldg. Co., 112 Oh. St. 654, 148 N. E. 842 (1925)

[2] Ill.—Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767 (1932)
Me.—York Harbor Village Corporation v. Libby, 126 Me. 537, 140 A. 382 (1928)
N. Y.—A change of map from business to residence in order to harmonize with a new parkway was upheld—Leone v. Brewer, White Plains (N. Y.) Daily Reporter, December 30, 1927, 222 App. Div. 773, 225 N. Y. S. 856 (1927)
Ohio—Srigley v. Woodworth, 33 Oh. A. 406, 169 N. E. 713 (1929)
Pa.—Kerr's Appeal, 294 Pa. 246, 144 A. 81 (1928)

[3] Cochran v. Preston, 108 Md. 220, 70 A. 113 (1908)

prefer to cling to fields where the evidence of qualified experts will aid them in coming to a conclusion. Light, air, quiet, and the effect of vegetation on the atmosphere are subjects wherein expert evidence can assist. There can be a perception of correctness and incorrectness on the part of the court if experts disagree. But if architectural expert witnesses disagree on what is good in color, texture, and architectural style, the court is left, without help, to decide a question of good taste. In countries where courts do not pronounce either for or against the reasonableness of police-power enactments, municipal requirements regarding color or architectural style sometimes obtain. Usually, however, there is much criticism from those whose advice has not been followed. If in this country there should be architectural control of all buildings by art commissions or juries, the criticism would be great, especially in cities where the regulation would fall into the hands of incompetent persons. Freedom from control on matters of good taste often permits undesirable conditions, but it also allows experimentation which in the long run may produce good results.

Roadside advertising on private land has opened up a fertile field of debate and an even more perplexing field of state and municipal legislation. The first comprehensive zoning ordinance in this country—that of Greater New York—provided that only dwellings, schools, clubs, and other similar buildings and uses were permitted in residence districts. Because it omitted billboards from the permitted uses billboard permits have been refused in residence districts, and the refusals have been upheld by the courts.[1] This was the first effective prevention of billboards on a large scale in this country. Advertising by billboards on private land is considered a business purpose, and is permitted in business and unrestricted districts only.

This method of preventing billboards has spread to all states. Farming localities and open country are zoned as residential, thus precluding the undesirable construction. But many large areas,

[1] N. Y.—Britting v. Hartman, Supreme Court, Queens County, New York Law Journal, August 19, 1933, modified New York Daily News, November 21, 1933
Lynbrook v. Harkness, Supreme Court, Nassau County, New York Law Journal, January 27, 1934
Pa.—Liggett's Petition, 291 Pa. 109, 139 A. 619 (1927)

especially agricultural townships distant from large cities, have no zoning regulations and do not want any. Consequently in almost every state a demand has arisen for state or county regulation and the prevention of roadside billboards regardless of zoning districts. It has been decided that roadside advertising constitutes a separate and distinct class of structures and that they need not be treated the same as buildings.[1] But this does not solve the entire problem. If billboards on private land do not interfere with the safe driving of automobiles, courts do not usually admit that they affect the health, safety, morals, comfort, convenience, and general welfare of the community.[2] If they are prevented by police-power regulations for purely esthetic reasons, the prevention will be held to be unlawful or else the courts will recognize esthetic reasons as the basis of invocation of the police power. The best way to control roadside advertising is the adoption of zoning ordinances by all municipalities or counties. This will exclude billboards in all residence districts and allow them only in business and industrial districts. Almost the total terrain of country areas can be placed in residence districts, and billboards which do not interfere with highway vision are not offensive in business and industrial districts.

Efforts to substitute state zoning for local zoning will produce serious problems. The clamor for state zoning of roadsides will tend to confuse state and local zoning, resulting in loss of local support and depriving municipalities of desired autonomy. In the fields where states exercise zoning powers, local powers will cease.[3]

Massachusetts adopted a constitutional amendment empowering the state legislature to make laws for the regulation of billboards. The state highway commission was given the power of control by licenses. Outdoor advertising companies resisted the enforcement of such powers and their resistance gave rise in 1935 to the important decision of General Outdoor Advertising Co. v. Department of Public Works (289 Mass. 149, 193 N. E. 799). In that deci-

[1] St. Louis Poster Advertising Co. v. City of St. Louis (Mo.), 249 U. S. 269, 39 S. Ct. 274 (1919)

[2] Perlmutter v. Greene, 259 N. Y. 327, 182 N. E. 5 (1932)

[3] Mass.—General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N. E. 799 (1935)
Inspector of Buildings of Falmouth v. General Outdoor Advertising Co., 264 Mass. 85, 161 N. E. 899 (1928)

sion the highest court of the state upheld the protection of roadside edges and rural scenery from defacement by billboards. Although this is not a zoning case it contains perhaps the best analysis of the esthetic possibilities of billboard regulation.

State legislatures adopting a method of state control of billboards should therefore exclude municipalities and counties where control is exercised through zoning ordinances.

Accessory Buildings and Uses

During the formative period of comprehensive zoning it became evident that districts could not be confined to principal uses only. It had always been customary for occupants of homes to carry on gainful employments as something accessory and incidental to the residence use. The doctor, dentist, lawyer, or notary had from time immemorial used his own home for his office. Similarly the dressmaker, milliner, and music teacher worked in her own home.[1] The earliest zoning ordinances took communities as they existed and did not try to prevent customary practices that met with no objection from the community. Indeed there would have been great opposition to early zoning plans if efforts had been made to prevent doctors or dressmakers from using their own homes in residential districts. Customary incidental home occupations are therefore allowed as accessory uses, even in new houses in residential districts. When such uses are in accessory buildings, as is often the case, they are similarly allowed. A smoke-house, a doctor's or lawyer's office on the same lot as his home, a stable for horse and carriage, and a private garage are good examples of accessory buildings.[2]

Many ordinances have elaborate statements regarding accessory buildings and uses, but they can usually be reduced to a prohibition of business and a requirement that the accessory building must be on the same lot as the main building. The provisions of the Greater New York building zone resolution are simple. They do not enumerate permitted accessory uses but state that customary incidental uses are allowed in residence districts, that accessory buildings must be on the same lot as the main building, and that

[1] People v. Kelly, 255 N. Y. 396, 175 N. E. 108 (1931)

[2] See cases cited under Stables, Private Garages, etc., p. 204

business will not be allowed. It is remarkable how well these general regulations have worked out with the help of the courts. There seems to be no demand for more specific rules. The permitted uses must be incidental and not the main use. The main use of a doctor's home is his residence, but his office and professional practice are incidental. If he moves from his home he cannot use the entire building as an office for himself and his associates while he lives elsewhere. If he could, this would be making the practice of medicine the main use of the building and not an accessory use. A dressmaker in a residence district may not employ a dozen seamstresses while she keeps up a pretense of residence by sleeping in a back room. In such a case dress manufacture and merchandising would be the main use. Accessory uses must be customary. Taking in washing may annoy the neighbors more than a manicure parlor, but probably the former is a customary use and the latter is not. A shoemaker's work in his home is customary while the work of a barber at home is not. Distinctions are sometimes difficult but an accumulation of words in the ordinance does not usually clarify. Very likely a woman hairdresser or a man barber working in their respective homes would not be complained against by neighbors, but if the woman displayed advertising or the man a barber pole the building inspector would object.

The accessory use must not be a business.[1] A real estate office or a plumbing shop would be so regarded. An antiquity shop would be a business because goods would be brought into the house to sell and merchandising would be carried on. Selling one's household goods before moving to a distant place would be allowable in a residence district, but the successive filling up of the house with furniture and advertising and carrying on removal sales would be business and has been stopped. Boarding houses are often allowed by ordinances in residence districts. The incidental furnishing of meals to travellers or others would be an accessory use, but exposing a sign marked "Restaurant" would show that the use was business and the inspector would cause a discontinuance.[2] Hotels

[1] N. Y.—B. & L. Enterprises, Inc. v. Schneider, Supreme Court, Westchester County, New York Law Journal, December 30, 1933
Stockton Tea Room, Inc. v. Copeland, Supreme Court, New York County, New York Law Journal, April 19, 1922

[2] See cases cited under Restaurants, p. 211

are permissible in residence districts in some cities. The showing of dresses or jewelry for sale inside the hotel would be considered an incidental use but the display in a window by an automobile touring association of a small sign saying that automobile license plates could be procured inside has been considered a business and has been stopped.

A music studio is a lawful accessory use in a residence district in New York City. The fact that loud singing occurs does not produce a violation of the building zone resolution but possibly it might be stopped as a nuisance.[1] A business sign has been held to be a lawful accessory addition to a nonconforming office building.[2]

In the zoning of farming communities difficulties arise regarding the raising and keeping of animals. The usual ordinance permits farming in residence districts. Experience has shown that the word "agriculture" is better in most parts of this country. "Farming" includes both agriculture and animal raising. If so interpreted in zoning ordinances, animal raising is as much a principal use as agriculture. Chicken farms and duck farms may be equivalent to industries where space is limited and food is brought from outside. When in or near thickly-settled communities they may be injurious on account of odor. In some parts of the country—especially near large cities where no adequate pasturage is possible—dairies may be injurious to surrounding residents. If the raising of animals is a lawful principal use, then these injurious uses may be begun as a matter of right. If, however, agriculture can be carried on as the principal use and the raising of animals only as an accessory use, the situation will be entirely changed. A small number of animals such as is usually kept on what we call a farm would then be lawful. It would undoubtedly be considered that the keeping of thirty or forty hens is an accessory use. But if a chicken farm were begun as a business, it would be ruled out. The question arises whether farming is synonymous with agriculture. A Texas court

[1] People v. Kelly, 255 N. Y. 396, 175 N. E. 108 (1931)

[2] Ill.—Illinois Life Insurance Co. v. City of Chicago, 244 Ill. A. 185 (1927)

N. Y.—Towers Management Corporation v. Thatcher, Supreme Court, Kings County, New York Law Journal, September 10, 1935, 246 App. Div. 835, 286 N. Y. S. 435, 271 N. Y. 94, 2 N. E. (2d) 273 (1936)

opinion, rendered in 1923, gives a careful review of definitions as follows:

> He [Webster] defines "farm":
>
> "Orig. a piece of land held under lease for the purpose of cultivation; hence any tract of land (whether consisting of one or more parcels) devoted to agricultural purposes, including the production of crops and generally of animals, under the management of the tenant or the owner." . . .
>
> In connection with the definition of farm, Bouvier's Law Dictionary quotes the following: "A large tract or portion of land taken by lease under a yearly rent payable by the tenant. Tomlin, Law Dict. From this latter sense is derived its common modern signification of a large tract used for cultivation or other purposes, as raising stock, whether hired or owned by the occupant, including a messuage with outbuildings, gardens, orchards, yards, etc. Blowd, 195, Touchst. 93."
>
> The noun "farm" means a tract of land chiefly under cultivation. While it is in this sense that the word is most frequently used, yet, as we have seen in its general scope and significance it means any tract of land used for the production of crops or the rearing of animals.[1]

. This subject is painstakingly discussed in a Connecticut case in which is a strong dissenting opinion. The majority opinion holds that a chicken farm is not a proper accessory use in a residence district under the heading of farming.[2] In view of the double meaning of "farming," it is well to omit the word from zoning ordinances and use "agriculture" instead. Where, however, population is scanty and farming areas are large, it may be desirable to continue the word "farming."

Quite apart from farms or agriculture, animals can be kept in a residence district as an accessory use, where the main use is residential. The keeping of a dog, horse, cow, or a reasonable number of hens under such circumstances is a customary accessory use. Some ordinances enumerate the kinds of animals that can be kept. If possible, this practice should be avoided. Local health laws enforced by the police should be sufficient to protect a municipality

[1] Gordon v. Buster, 113 Tex. 382, 257 S. W. 220 (1923)

[2] Chudnov v. Board of Appeals of Bloomfield, 113 Conn. 49, 154 A. 161 (1931)
See also Winship v. Inspector of Buildings of Wakefield, 274 Mass. 380, 174 N. E. 476 (1931)

against the keeping of offensive or dangerous animals. If pigs and bees should be excluded from residence districts in a city, there is an equal justification for excluding them from business and industrial districts. Therefore regulations specifying them should not be placed in a zoning ordinance but in a separate ordinance applicable alike to all parts of the city. The zoning ordinance should contain only regulations that apply to particular districts.

Where general contracting is allowed in a business district, the equipment can be stored as accessory.[1]

Accessory buildings are often confined to the rear part of the lot, or are not allowed within a certain distance from lot lines.[2]

A lawful nonconforming use carries the right to have accessory buildings. Such buildings, used by a nonconforming race track, are an illustration.[3]

[1] Greenfield v. Board of City Planning Com'rs of Los Angeles, 6 Cal. A. (2d) 515, 45 P. (2d) 219 (1935)

[2] Sundeen v. Rogers, 83 N. H. 253, 141 A. 142 (1928)

[3] Empire City Racing Assn. v. City of Yonkers, 132 Misc. 816, 230 N. Y. S. 457 (1928)

CHAPTER V

NONCONFORMING BUILDINGS AND USES

Continuance of Use

NONCONFORMING buildings and uses existing when an ordinance goes into effect are allowed to continue. It has been considered that buildings erected according to law, even if out of place, should be allowed to stand indefinitely, and that the nonconforming use should not be stopped.[1] Zoning seeks to stabilize and protect and not to destroy. The view that has been followed is that a few nonconforming buildings and uses if allowed to continue will not be a substantial injury to a community if only such nonconforming buildings are not allowed to multiply where they are harmful or improper. Zoning has sought to safeguard the future, in the expectation that time will repair the mistakes of the past. When nonconforming buildings are destroyed by fire or other act of God, they ought not to be allowed to be rebuilt as a matter of right. If owners of such buildings plan to alter them substantially, they should be forced by the ordinance to consider the possibilities of rebuilding in a conforming manner.[2]

[1] Cal.—Biscay v. City of Burlingame, 127 Cal. A. 213, 15 P. (2d) 784 (1932)
Blumenthal & Co. v. Cryer, 71 Cal. A. 668, 236 P. 216 (1925)
Ryan v. Andriano, 91 Cal. A. 136, 266 P. 831 (1928)
Wilson v. Edgar, 64 Cal. A. 654, 222 P. 623 (1923)
Conn.—*Enlarging nonconforming building.* Thayer v. Board of Appeals of Hartford, 114 Conn. 15, 157 A. 273 (1931)
Kan.—City of Norton v. Hutson, 142 Kan. 305, 46 P. (2d) 630 (1935)
La.—Charbonnet v. City of New Orleans, 176 La. 1050, 147 S. 345 (1933)
Hochfelder v. City of New Orleans, 171 La. 1053, 132 S. 786 (1931)
Mich.—Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N. W. 86 (1928)
N. J.—Cannady v. Town of Montclair, 7 N. J. Misc. 1045, 147 A. 737 (1929)
N. Y.—People v. Miano, 234 App. Div. 94, 254 N. Y. S. 105 (1931)
Welch v. City of Niagara Falls, 210 App. Div. 170, 205 N. Y. S. 454 (1924)
Wash.—Hardy v. Superior Court of King County, 155 Wash. 244, 284 P. 93 (1930)
Wis.—Bartkus v. Albers, 189 Wis. 539, 208 N. W. 260 (1926)
Carter v. Harper, 182 Wis. 148, 196 N. W. 451 (1923)

[2] N. Y.—Collins v. Moore, 125 Misc. 777, 211 N. Y. S. 437, affd. 215 App. Div. 786 213 N. Y. S. 782 (1925)
DeFine v. Board of Health, 125 Misc. 797, 211 N. Y. S. 717, affd. 217 App. Div. 753, 216 N. Y. S. 821 (1926)
Ortman v. Burwell, Supreme Court, Kings County, New York Law Journal, July 3, 1929
Wightman v. Foster, Supreme Court, Westchester County, Westchester Law Journal, August 23, 1932, 237 App. Div. 906, 261 N. Y. S. 1002 (1933)

Under the claim of being an existing nonconforming use a building will sometimes be enlarged and become to a greater extent nonconforming.[1] Many open-air automobile repair shops with laundries and greasing pits exist today in residence and business districts in New York City which have gradually enlarged from a single gasoline pump that was in place before zoning began. This was partly due to the fact that neighbors neglected to file complaints and partly because city officials were complaisant or negligent.

A lawful nonconforming building can be repaired and its parts restored, and the building inspector cannot refuse suitable permits.[2]

In New York City the building zone resolution provides that if structural alterations need to be made, a nonconforming building cannot be changed to another nonconforming use. A variance permit may be granted by the Board of Appeals in a proper case.[3]

The use of a building can be shown by its form. For instance, a store with plate glass front, constructed before a zoning ordinance went into effect and never actually used as a store, would be a lawful nonconforming store in a residence district after zoning, and could be used as a store. Even if such a building were used temporarily for residential purposes, its use would not be deemed to change.[4]

Where a building department through mistake has issued a permit for a nonconforming building, and construction has proceeded and no appeal to the board of appeals has been taken by neighbors, the permit will not be revoked.[5]

[1] Town of Lexington v. Bean, 272 Mass. 547, 172 N. E. 867 (1930)

[2] Ill.—Klumpp v. Rhoads, 200 N. E. 153 (1936)
N. J.—Provident Institution for Savings v. Castles, 11 N. J. Misc. 773, 168 A. 169 (1933)
Weisman v. Spoerer, 11 N. J. Misc. 731, 168 A. 217 (1933)

[3] Mass.—LaMontagne v. Kenney, 288 Mass. 363, 193 N. E. 9 (1934). This case would be decided differently in New York City.
N. Y.—Werbelowsky & Lavine Realty Corp. v. Walsh, Supreme Court, Kings County, N. Y., New York Law Journal, January 13, 1925

[4] N. Y.—Town of Islip v. Newton, Supreme Court, Suffolk County, New York Law Journal, November 10, 1933
Knickerbocker Ice Co. v. Sprague, 4 F. Supp. 499 (1933)
Wohl v. Leo, 109 Misc. 448, 178 N. Y. S. 851, affd. 201 App. Div. 857, 192 N. Y. S. 945 (1922)

[5] Iowa—Call Bond & Mortgage Co. v. Sioux City, 219 Iowa 572, 259 N. W. 33 (1935). In this case it is doubtful whether the council had the power to revoke the permit.

Footnote continued on page 107.

Completion of Nonconforming Buildings

The effective beginning date of the ordinance nearly always breaks off some proposed building enterprise and the question arises whether the builder should stop or be allowed to proceed. Sometimes, prior to the effective date, he has procured his permit and ordered his structural steel. Sometimes he has procured his permit, his steel has been partly fabricated, and yet the cellar has not been excavated. Sometimes he has procured his permit, put in the footing course, and gone no further. Sometimes he has procured his permit, completed the cellar, the sill, and the first tier of beams. In any one of these cases he considers that he is wronged if he is not allowed to complete his nonconforming building.[1]

Footnote continued from page 106.

N. J.—Freeman v. Hague, 106 N. J. L. 137, 147 A. 553 (1929)
Grossman v. Mayor and Aldermen of Jersey City, 6 N. J. Misc. 688, 142 A. 558 (1928)
Wyo.—Wikstrom v. City of Laramie, 37 Wyo. 389, 262 P. 22 (1927)

[1] Cal.—London v. Robinson, 94 Cal. A. 774, 271 P. 921 (1928)
Wheat v. Barrett, 210 Cal. 193, 290 P. 1033 (1930)
Yuba City v. Cherniavsky, 117 Cal. A. 568, 4 P. (2d) 299 (1931)
Conn.—Fitzgerald v. Merard Holding Co., 106 Conn. 475, 138 A. 483, 110 Conn. 130, 147 A. 513 (1929)
City of New Britain v. Kilbourne, 109 Conn. 422, 147 A. 124 (1929)
D. C.—District of Columbia v. Cahill, 60 App. D. C. 342, 54 F. (2d) 453 (1931)
Ill.—City of Chicago v. Nord, Municipal Court, Chicago, January, 1925
Hurt v. Hejhal, 259 Ill. A. 221 (1930)
La.—Hundley v. City of Alexandria, 164 La. 624, 114 S. 491 (1927)
Manhein v. Harrison, 164 La. 564, 114 S. 159 (1927)
St. Bernard Oil Co. v. City of New Orleans, 165 La. 665, 115 S. 817 (1928)
City of Shreveport v. Dickason, 160 La. 563, 107 S. 427 (1926)
Mass.—Commonwealth v. Dillon, 277 Mass. 196, 178 N. E. 521 (1931)
N. Y.—Alshap Realty Corp. v. Kleinert, Supreme Court, Kings County, New York Law Journal, July 16, 1926, 218 App. Div. 862, 219 N. Y. S. 768 (1926)
Cherry v. Isbister, 201 App. Div. 856, 193 N. Y. S. 57, affd. 234 N. Y. 607, 138 N. E. 465 (1922)
Fox Lane Corp. v. Mann, 216 App. Div. 813, 215 N. Y. S. 334, affd. 243 N. Y. 550, 154 N. E. 600 (1926)
Fox Lane Corp. v. Moore, 216 App. Div. 813, 216 N. Y. S. 832, affd. 243 N. Y. 550, 154 N. E. 600 (1926)
Frankel v. Kleinert, Supreme Court, Kings County, New York Law Journal, April 21, 1925
In re Nationwide Petrol Corp., Supreme Court, Kings County, New York Law Journal, April 4, 1935
Rice v. Van Vranken, 225 App. Div. 179, 232 N. Y. S. 506, affd. 255 N. Y. 541, 175 N. E. 304 (1930)
Tonson Realty Corp. v. Fried, Supreme Court, Kings County, New York Law Journal, June 17, 1926
N. C.—In re W. P. Rose Builders' Supply Co., 202 N. C. 496, 163 S. E. 462 (1932)
Wash.—Liberty Lumber Co. v. City of Tacoma, 142 Wash. 377, 253 P. 122 (1927)

When the building zone resolution of Greater New York was adopted, it provided that any person who had obtained a lawful permit before that date should be allowed to complete his building, subject only to certain time limitations for successive stages of progress. This method had the advantage of giving every builder a fair chance and preventing a large amount of litigation.[1] Many of the plans were hurriedly prepared on which the permits were obtained, and on more mature consideration the buildings were not erected. The city adopted the generous attitude that it could better afford to have a few nonconforming buildings built at the last minute than to incur the animosity of a considerable section of the property owners at a time that was critical for the success of zoning. Many other municipalities have not followed such a liberal policy. On this account the courts have been appealed to on many diverse situations which have arisen where construction has been stopped by the authorities. Even in Greater New York a change of district would bring up questions of withdrawal of permits where builders had incurred preliminary expense. Thus it happens that either on account of a new ordinance, or the amending of an old one, the courts are called on to decide what degree of progress will entitle the builder to proceed with the construction of his nonconforming building. The law is not settled on this point. In different states and parts of states the courts appear to make different rulings. As the regulations are established for the health and safety of the community, the prohibition might be considered by the court to stop construction at any stage of incompleteness. Strictly speaking, no property owner has any vested rights as against a lawful police power requirement. Courts, however, usually have held that such strictness is unduly destructive to investments.[2] In and near Greater New York the local authorities consider that if the builder has his permit and has laid the footing course of his cellar, he is entitled to complete his nonconforming building. Courts in different states have exercised varying degrees of leniency.[3]

[1] Bolce v. Hauser, 111 Oh. St. 402, 145 N. E. 851 (1924)

[2] Conn.—City of New Britain v. Kilbourne, 109 Conn. 422, 147 A. 124 (1929)
D. C.—District of Columbia v. Cahill, 60 App. D. C. 342, 54 F. (2d) 453 (1931)
Ill.—Hurt v. Hejhal, 259 Ill. A. 221 (1930)

[3] Averell v. Thatcher, Supreme Court, Kings County, N. Y., New York Law Journal, December 24, 1935

Additions to Nonconforming Buildings

A nonconforming building cannot be enlarged as a matter of right. If it could be there might be no limit to the enlargement of a nonconforming factory. The new construction might destroy a residence district whereas the continuance of the original building would be comparatively harmless.[1] The New York City building zone resolution provided that the Board of Appeals might in its discretion, as an item of original jurisdiction, issue a variance permit for an addition on land occupied by the original building and owned by the same person at the time that the resolution went into effect. This was intended to recognize the unfairness of forcing the removal of every store or factory that needed more space. It might be an extremely serious matter to destroy the old building with the good-will attached to it. It was a question of a fair balance between the needs of the owner and the harm to the community. As time went on it was found that variances might in rare cases be fairly issued for extensions on adjoining land not owned at the time the resolution was passed. This was accomplished by basing the appeal on practical difficulty and unnecessary hardship. Boards of appeals now throughout the country recognize the occasional fairness of variances for extensions on those two grounds, and the item of original jurisdiction is usually omitted in the ordinance. Such permits are, however, dangerous. Efforts should constantly be made to remove nonconforming uses into districts intended for them. They should not be perpetuated any longer than necessary.

Occupancy Permits

Many cities require the builder to obtain a permit to begin work, and require an occupancy permit before the building can be used. The purpose is to make sure that all lawful requirements have been complied with before occupation and that the building is a conforming building. Other cities do not require occupancy permits in all cases of new buildings but only where there is a reconstruction

[1] N. J.—De Vito v. Pearsall, 115 N. J. L. 323, 180 A. 202 (1935)
Dickinson v. Inhabitants of Plainfield, 13 N. J. Misc. 260, 176 A. 716, 116 N. J. L. 336, 184 A. 195 (1936)
R. I.—East Providence Mills v. Zoning Board of Review of East Providence, 51 R. I. 428, 155 A. 531 (1931)

or a change of use.[1] A change of use is when the change is from one district classification to another. For instance, the change of a dwelling to a store is a change of use. Changing one kind of store to another is not considered a change of use. For example, a grocery store may be changed to a book store or a butcher shop without obtaining an occupancy permit. In New York City the change in a nonconforming building from one form of heavy industry to another form—as from a brewery to a boiler shop—is regarded as a change of use and requires an occupancy permit.

Refusal of Lawful Permit

Municipalities that are about to adopt or amend zoning ordinances are often eager to prevent new buildings that will soon become nonconforming. Sometimes the building inspector is told not to issue permits for a few weeks pending the adoption of the ordinance or amendment. It is usually held that the builder is entitled to an order of mandamus compelling the issue of the permit,[2] but in a few cases the municipality has enjoined the builder

[1] N. Y.—Bregman v. Reville, 131 Misc. 486, 226 N. Y. S. 285, affd. 223 App. Div. 756, 227 N. Y. S. 776 (1928)
Horwitz v. Schwab, 130 Misc. 448, 224 N. Y. S. 41 (1927)
Russo v. Murdock, Supreme Court, Kings County, New York Law Journal, March 1, 1934
Seidenberg v. Burwell, 235 App. Div. 745, 255 N. Y. S. 996 (1932)
Pa.—Appeal of Thompson, Court of Common Pleas, Allegheny County, October Term, 1925, and June 29, 1926
Wis.—Wasserman v. Cooper, 201 Wis. 359, 230 N. W. 50 (1930)

[2] La.—Hundley v. City of Alexandria, 164 La. 624, 114 S. 491 (1927)
Sansone v. City of New Orleans, 163 La. 860, 113 S. 126 (1927)
N. J.—Holdsworth v. Hague, 9 N. J. Misc. 715, 155 A. 892 (1931)
Horowitz v. Rath, 9 N. J. Misc. 203, 153 A. 250 (1931)
Linwood Co. v. Gardner, 9 N. J. Misc. 139, 153 A. 99 (1931)
Mongiello Bros., Inc. v. Board of Com'rs of Jersey City, 10 N. J. Misc. 131, 158 A. 325 (1932)
Pabst v. Ferner, 8 N. J. Misc. 621, 151 A. 368 (1930)
Paffendorf v. Lyndhurst Tp., 1 N. J. Misc. 289, 129 A. 389 (1923)
Reimer v. Dallas, 129 A. 390 (1925)
N. Y.—Calton Court, Inc. v. Switzer, 221 App. Div. 799, 223 N. Y. S. 856 (1927)
Matter of Hart, Supreme Court, Kings County, New York Law Journal, December 24, 1935
N. C.—Bizzell v. Board of Aldermen of Goldsboro, 192 N. C. 348, 135 S. E. 50 (1926)
Ohio—Hauser v. Erdman, 113 Oh. St. 662, 150 N. E. 42 (1925)
Ice & Fuel Co. v. Kreuzweiser, 120 Oh. St. 352, 166 N. E. 228 (1929)
Pa.—Coyne v. Prichard, 272 Pa. 424, 116 A. 315 (1922)
Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930)
Tex.—Marshall v. City of Dallas, 253 S. W. 887 (1923)

on the ground that a prohibitive regulation is about to be passed.[1] It would appear to be no part of the duty of the building inspector to anticipate whether or not a change will be made in the law.

An owner cannot build without a permit on the ground that the ordinance is void. He should bring an action to compel the building inspector to issue a permit to him and allege in the action that the ordinance is void.[2]

Abandonment

It is usually provided that when a nonconforming building or use is abandoned it may not be reinstated.[3] There is great variety in these provisions, some of them being such drastic attempts that courts hesitate to enforce them.[4] Long discontinuance of use can show abandonment. Intention to use no further is involved in abandonment although not necessarily in discontinuance.[5] Some ordinances provide that discontinuance for six months shall be considered an abandonment. It is evident that such a provision refers to actual use and not use as shown by form or construction. For instance, a one-family residence used for a store could not after a six months' discontinuance as a store be reëstablished as a lawful nonconforming store, but a structure built as a store with a plate glass front could be unoccupied for six months and could still be established as a lawful nonconforming store.

Destruction

The New York City building zone resolution has always allowed nonconforming buildings, if destroyed, to be rebuilt, but most ordinances allow rebuilding only when the destruction is partial.[6]

[1] N. J.—Commuters' Coach Co. v. Minton, 7 N. J. Misc. 478, 146 A. 921 (1929)
N. Y.—Voelcker v. Seaman, Supreme Court, Kings County, New York Law Journal, July 2, 1928

[2] Nolan v. Village of Mill Neck, Supreme Court, Kings County, N. Y., New York Law Journal, July 16, 1932

[3] Conn.—Town of Darien v. Webb, 115 Conn. 581, 162 A. 690 (1932)
La.—Van Horn v. City of New Orleans, 161 La. 767, 109 S. 484 (1926)

[4] Comstock v. City of New Britain, 112 Conn. 25, 151 A. 335 (1930)

[5] N. Y.—Baum v. Board of Standards and Appeals, Supreme Court, Kings County, New York Law Journal, April 19, 1935
Wis.—Schaetz v. Manders, 206 Wis. 121, 238 N. W. 835 (1931)

[6] Conn.—Piccolo v. Town of West Haven, 120 Conn. 449, 181 A. 615 (1935)
State v. Hillman, 110 Conn. 92, 147 A. 294 (1929)

Footnote continued on page 112.

When a building is removed to another zoning district, it must comply with the regulations of the new district.[1]

An owner cannot tear down a nonconforming store in a residence district and claim as a matter of right a permit to erect another store in its place.[2]

Retroactive Regulations

There is little doubt that under zoning ordinances municipalities, if they wish, can succeed in ousting nonconforming uses and buildings. If the police power can be invoked to prevent a new nonconforming building because of its relation to the community health, safety, morals, convenience, and general welfare, it follows that the police power can be invoked to oust existing nonconforming uses. Theoretically the police power is broad enough to warrant the ousting of every nonconforming use, but the courts would rightly and sensibly find a method of preventing such a catastrophe. If a well-built and well-planned apartment house was erected before zoning, in an area which later was made a one-family residence district in the zoning ordinance, it could hardly be expected that the apartment house could be ousted with the help of the courts. The courts would undoubtedly hold that zoning regulations must be reasonable, and that the ousting of an expensive structure built in accordance with a proper permit would not be considered reasonable. This brings us to the difficult problem with which we must often cope in zoning—that is, the establishment of the line between what is a reasonable regulation and what is unreasonable.

Not many cases have arisen in the courts on ousting existing nonconforming buildings. One of the earliest and best known is the Hadacheck case[3] which arose in Los Angeles before the word

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Footnote continued from page 111.

La.—Hourgette v. City of Gretna, 18 La. A. 336, 137 S. 344 (1931)

Ohio—Kelly v. Dissinger, Court of Common Pleas, Montgomery County, Oakwood, April 10, 1928

Wash.—Modern Lumber & Millwork Co. v. MacDuff, 161 Wash. 600, 297 P. 733 (1931)

[1] Bianchi v. Commissioner of Public Buildings of Somerville, 279 Mass. 136, 181 N. E. 120 (1932)

[2] Ward's Appeal, 289 Pa. 458, 137 A. 630 (1927)

[3] Hadacheck v. Sebastian, 165 Cal. 416, 132 P. 584, 239 U. S. 394, 36 S. Ct. 143 (1915)

"zoning" was used in this country and before any comprehensive zoning ordinance had been adopted. By means of a local ordinance based on the home rule constitution of California, brick-kilns were excluded from a district largely residential. The city authorities accordingly proceeded to oust a brick-burning establishment which made bricks from clay obtained on the premises. The ousting was upheld by the Supreme Court of California and also by the United States Supreme Court, although it was an existing nonconforming use. The taking of clay from the earth was not prohibited but baking it was declared to be harmful to the community.

Two cases arose in New Orleans under a zoning ordinance which allowed the ousting of nonconforming uses.[1] One of these was a grocery store which was ordered to cease operating and depart after one year, and the other was the case of a drug store which was similarly decided. Both were existing nonconforming uses. The reasoning of the court in the New Orleans cases seems to be that one year is a reasonable time for amortization.

During the preparatory work for the zoning of Greater New York fears were constantly expressed by property owners that existing nonconforming buildings would be ousted. The demand was general that this should not be done. The Zoning Commission went as far as it could to explain that existing nonconforming uses could continue, that zoning looked to the future, and that if orderliness could be brought about in the future the nonconforming buildings would to a considerable extent be changed by natural causes as time went on. It was also stated by the Commission that the purpose of zoning was to stabilize and protect lawful investments and not to injure assessed valuations or existing uses. This has always been the view in New York. No steps have been taken to oust existing nonconforming uses. Consideration for investments made in accordance with the earlier laws has been one of the strong supports of zoning in that city.

We now come to a field that has proved troublesome throughout the country. Can an existing nonconforming use of land be prohibited under the ordinary zoning ordinance? Let us assume that a landowner has enclosed a lot, flooded it for a skating rink, and

[1] La.—Dema Realty Co. v. Jacoby, 168 La. 752, 123 S. 314 (1929)
Dema Realty Co. v. McDonald, 168 La. 172, 121 S. 613 (1929)

charged admission. Later the locality is placed in a residence district. Can the skating rink be continued forever? Is a ticket booth thereon such a building as may be continued as an existing nonconforming use? Can the use be changed to the vending of candy and cigars, which is a business use of the same grade? A nonconforming parking space for automobiles in the Borough of The Bronx was declared to be rendered unlawful by the passage of an amendment preventing such parking spaces in business districts. Magistrate Kross wrote a careful opinion distinguishing an unbuilt lot from a permanent structure.[1]

A few years ago miniature golf courses were the vogue. Where a property owner established such a golf course before zoning, could he continue it after the locality was placed in a residence district? Was the land stamped as business land so that business buildings could be erected on it? Could a building containing a ticket office, toilets, and rest-room facilities be continued as a business building and changed to another business such as groceries?

Such instances made a great deal of trouble throughout the country, especially in boards of appeals and the minor courts. Usually the solution depended on the precise words of the ordinance. Sometimes the ordinance provided that a building's nonconforming use existing before the effective date of the ordinance could continue and could be extended throughout the structure. Where only the word building was employed the problem was somewhat simplified because many of the uses—like tennis courts, skating rinks, and miniature golf courses—applied only to the land. But some ordinances provided that the existing nonconforming use of a building or premises could be continued. Sometimes the words were "a building or land." Here was a situation plainly more troublesome. A court case arose in the town of Hempstead, N. Y., where the word "premises" was used in the ordinance. A tenant in a residence district began to tow ancient automobiles into his yard, carry on a dismantling business, and leave the parts scattered around. Before long he had more than a hundred old cars in his yard in various stages of destruction. The neighbors made a complaint on the ground that he had started a nonconforming use, i. e., an automo-

[1] People v. Wolfe, Magistrates' Court, Borough of The Bronx, N. Y., New York Law Journal, January 30, 1936, affd. 248 App. Div. 721 (1936)

bile dismantling industry in a residence district. The tenant alleged as his defense that in his barn prior to the passage of the zoning ordinance he had dismantled several automobiles as a business. He produced a mechanic who declared that he had helped to do the dismantling. All of this was unknown to the neighbors and the proof was hard to contradict. Fortunately the junk-yard tenant failed to pay his rent and he was dispossessed by his landlord. Thus the automobile junk yard was wiped out.

It is better not to have the nonconforming clause of the zoning ordinance refer to "land or premises." The privilege of continued use may well be applied to existing buildings, but should not be applied to existing land or premises.

An existing nonconforming building, even if a mere shack, can usually be retained and continued. If this can be done in the case of a business use in a residence district, it follows that the building can be assigned to a new use of the same grade. For instance, a candy and cigar-vending booth can be changed to a small grocery store. In Brooklyn, when the building zone resolution took effect, there was a small real estate office on Avenue J in a residence district. Later it was changed to a small hand laundry. The neighbors protested, but the corporation counsel of the city held that the change did not alter the nonconforming use and that the laundry might continue.

There is much to be said about providing in zoning ordinances for the ousting of existing nonconforming uses where the buildings are unimportant or merely accessory to a nonconforming use of the land. Several ordinances in Long Island provide that billboards in residence districts must cease and be discontinued within five years. This provision is based on the principle that a reasonable time for amortization should be allowed. Similarly the ousting of automobile junk yards with accessory buildings is provided for, the owner being given from three to six years to amortize. This form of procedure can probably be applied to the unimportant buildings connected with tennis courts, miniature golf courses, skating rinks, and amusement parks. How far can zoning ordinances go in ousting more permanent existing nonconforming buildings and uses? Very likely in just the proportion that the building is permanent, well constructed, and costly the courts will

declare that it is unreasonable to oust it. A building with a cellar will not be so easy to oust as a building without a cellar. A one-story building will probably be more easily ousted than a three or four story nonconforming building.

Some parts of the country will probably go further in upholding the ousting of existing nonconforming buildings than others. New England and New York will declare drastic regulations of this sort unreasonable. States further west will probably be more complaisant with efforts to bring about orderliness. Each state will decide for itself how far it will go.

Some state enabling acts for zoning contain a provision that no regulations shall be made retroactive. Most enabling acts, however, contain no such provision and the municipality is left to arrange these regulations as it sees fit.[1] The charter of the City of New York and the three zoning enabling acts of the state of New York omit any provision prohibiting retroactive regulations. The same is true of the standard form of enabling act for zoning prepared by the United States Department of Commerce. State legislatures ought not to prevent municipalities from using zoning regulations retroactively. The future development of zoning may show that this power to oust existing nonconforming buildings and uses in certain cases is most important.

[1] Cal.—Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930)
Ky.—Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 S. W. (2d) 960 (1932)
Mass.—Inspector of Buildings of Watertown v. Nelson, 257 Mass. 346, 153 N. E. 798 (1926)
Ore.—Berger v. City of Salem, 131 Ore. 674, 284 P. 273 (1930)

CHAPTER VI

BOARD OF APPEALS

Its Composition

NEARLY all state enabling acts give the local legislative body power to establish a board of appeals, sometimes called a board of adjustment. The purpose of this board is to apply the discretion of experts to exceptional instances where permits are desired not strictly conforming to the regulations. The board takes action in such instances by granting orders known as "variances" or "variance permits."

It is a mistake to appoint on such board the building inspector or other person having the duty of issuing permits. The appeal to the board is usually from his determination, and it is best that an officer should not sit in the review of his own action. Local legislators should not be appointed. A board entirely so constituted tends to allow exceptions, as variances, which ought to be map changes made by the council.

Care should be taken not to assume that an existing board of appeals can function after a new enabling act and ordinance have been passed.[1]

A member of a board of appeals should not have financial interest in a proposed variance.[2]

Notice of Hearing before Board of Appeals

The board of appeals is usually required by the enabling act to give public notice of the hearing before it. This notice, often printed in an official paper, frequently does not reach the neighbors who may be most affected. On this account the board often requires applicants to post notices on or near the premises. Aggrieved owners sometimes learn of the application too late to be heard or too late to ask for court review. Personal service of notice cannot

[1] Smith v. Kearny Zoning Board of Appeals, 6 N. J. Misc. 954, 143 A. 151 (1928)
[2] Viano v. Chandler, Supreme Court, Middlesex County, Mass., January 28, 1927

well be required without placing too great a burden on the applicant.[1] Sometimes an owner is overseas and his address unknown, or he may be an infant or an incompetent person. If surrounding owners were required to be given notice by service, the title of each surrounding parcel would need to be searched by the applicant to make sure of the name of the owner. The required publication of the notice of hearing must not be omitted.[2]

Hearing before the Board

Nearly all enabling acts provide that the proceedings at a hearing before the board of appeals shall be a public record. This does not mean that a full verbatim record must be kept, or if taken by a stenographer that the whole is a public record.[3] The parts that may be directed to be filed are a public record.[4] It is not necessary that stenographic notes be kept, but the record of the hearing should contain a report of essential facts.

The opposition should not be cut off without a fair opportunity to be heard. It is a good plan for the presiding officer to state for the record that the board or a committee thereof has viewed the premises. This view can, however, be made later and reported in the return to the court. As the board is not a court of law, the applicant or any one in opposition can appear personally or by a representative. No lawyer is necessary.

If a public hearing is required by the state enabling act, no valid variance can be adopted in case the hearing is omitted.[5]

[1] Mass.—Kane v. Board of Appeals of Medford, 273 Mass. 97, 173 N. E. 1 (1930)
Roman Catholic Archbishop v. Board of Appeal of Boston, 268 Mass. 416, 167 N. E. 672 (1929)
N. J.—Mingle v. Board of Adjustment of Orange, 6 N. J. Misc. 595, 142 A. 367 (1928)
N. Y.—Kirkpatrick v. Zoning Board of Appeals, Supreme Court, Westchester County, White Plains (N. Y.) Reporter, March 16, 1925
Ottinger v. Arenal Realty Co., 257 N. Y. 371, 178 N. E. 665 (1931)

[2] Buffalo Cremation Co. v. March, 222 App. Div. 447, 226 N. Y. S. 477, affd. 249 N. Y. 531, 164 N. E. 572 (1928)

[3] Perdue v. Zoning Board of Appeals of Norwalk, 118 Conn. 174, 171 A. 26 (1934)

[4] Klein v. Walsh, Supreme Court, New York County, N. Y., New York Law Journal, June 21, 1930

[5] N. J.—Hendey v. Ackerman, 103 N. J. L. 305, 136 A. 733 (1927)
Pa.—Jones v. Lewis, 7 Pa. Dist. & Co. 785 (1926)

Vote Required for Variance

In framing the building zone resolution of the City of New York it was considered that inasmuch as the grant of a variance permit allowed the applicant to do something that his neighbors could not do under the strict application of the law, the favorable vote of the board should be greater than a mere majority. The charter of New York originally provided for a vote of five out of seven. The same requirement applied to a vote of reversal. This required vote of more than a majority to grant a variance has been followed in most of the zoning enabling acts of the country. The validity of the requirement has not been criticized by the courts. Where the law requires a quorum of a board of appeals to be present, a variance will be void even if passed by the required number of votes, a quorum not being present.[1]

Return to be Made by Board of Appeals

The return, if asked for by the court, should show the grounds on which it is made.[2]

A board of appeals making a return to the court is not entitled to the payment of fees.[3]

Rescission of Determination by the Board of Appeals

When a board of appeals has made a determination it should not recall the case and make another determination. It has exhausted its power regarding that particular state of facts.[4] The case will

[1] Gaston v. Ackerman, 6 N. J. Misc. 694, 696, 142 A. 545, 546 (1928)

[2] Garden Estates, Inc. v. Murdock, 241 App. Div. 761, 270 N. Y. S. 972, affd. 265 N. Y. 557, 193 N. E. 319 (1934)

[3] Brewster v. Wendt, 244 App. Div. 489, 279 N. Y. S. 291 (1935)

[4] Conn.—Burr v. Rago, 120 Conn. 287, 180 A. 444 (1935)
St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343 (1931)
Del.—In re Robelen, 33 Del. 314, 136 A. 279 (1926)
Ind.—Kaspar v. Board of Zoning Appeals, Circuit Court, Marion County, Indianapolis, April 30, 1926
N. J.—Citizens' Holding Co. v. Board of Adjustment of Newark, 7 N. J. Misc. 61, 144 A. 329 (1929)
Mingle v. Board of Adjustment of Orange, 6 N. J. Misc. 595, 142 A. 367 (1928)
N. Y.—Brennan v. Walsh, 195 N. Y. S. 264 (1922)
Church & 94th St. Realty Corp. v. Murdock, Supreme Court, Kings County, New York Law Journal, December 28, 1933

Footnote continued on page 120.

then go before the court for review. But if new facts come before the board of appeals, or a new or altered case regarding the same location, it can act anew.[1]

Reopening by the board of appeals and granting a variance, after a change of ownership but no change of facts, is unlawful.[2]

Where a board of appeals has ordered a building inspector to issue a variance permit, the local legislative body cannot prevent the inspector from acting.[3]

Variances

As zoning regulations differ for the several districts established, there is greater need of making exceptions than in most other fields of police power regulation. Sometimes a lot in a single ownership is bisected by a district line placing part of it in a business district and

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Footnote continued from page 119.

Collins v. Board of Standards and Appeals, Supreme Court, Bronx County, New York Law Journal, March 29, 1929, 253 N. Y. 594, 171 N. E. 797 (1930)
Ficaro v. Walsh, 226 App. Div. 441, 235 N. Y. S. 254 (1929)
Fox v. Kreuter, Supreme Court, Westchester County, New York Law Journal, August 3, 1935
Hall v. Walsh, 137 Misc. 448, 243 N. Y. S. 602, affd. 221 App. Div. 756, 222 N. Y. S. 816 (1927)
Heyman v. Walsh, 137 Misc. 278, 242 N. Y. S. 517, affd. 230 App. Div. 822, 245 N. Y. S. 769 (1930)
Horan v. Walsh, Supreme Court, Kings County, New York Law Journal, September 11, 1929, affd. 228 App. Div. 791, 239 N. Y. S. 815 (1930)
Parkway Center Building Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, May 12, 1928
Pirozzi v. Walsh, Supreme Court, Kings County, New York Law Journal, August 8, 1925
Riker v. Board of Standards and Appeals, 225 App. Div. 570, 234 N. Y. S. 42 (1929)
Riverside St. Clair Corp. v. Walsh, 131 Misc. 652, 228 N. Y. S. 88, affd. 225 App. Div. 655, 231 N. Y. S. 869 (1928)
Rubel Corp. v. Murdock, 245 App. Div. 821, 282 N. Y. S. 126 (1935)
Rutland Parkway, Inc. v. Murdock, 241 App. Div. 762, 270 N. Y. S. 971 (1934)
Sudierfi Realty Corp. v. Connell, Supreme Court, New York County, New York Law Journal, May 12, 1933, affd. 244 App. Div. 782, 280 N. Y. S. 791 (1935)
Swedish Hospital v. Leo, 120 Misc. 355, 198 N. Y. S. 397, affd. 215 App. Div. 696, 212 N. Y. S. 897 (1925)
N. C.—Little v. Board of Adjustment of Raleigh, 195 N. C. 793, 143 S. E. 827 (1928)

[1] Ruth Bond & Mort. Co. v. Murdock, Supreme Court, Kings County, N. Y., New York Law Journal, October 29, 1935

[2] N. Y.—McGarry v. Walsh, 213 App. Div. 289, 210 N. Y. S. 286 (1925)
N. C.—Application of Broughton Estate, 185 S. E. 434 (1936)

[3] Soho Park & Land Co. v. Town of Belleville, 6 N. J. Misc. 683, 142 A. 547 (1928)

part in a residence district. Lots are sometimes of peculiar shapes. Different street grades sometimes justify variances in permits. Often a locality actually and normally residential has sporadic stores that were erected before zoning was established. A vacant lot next to such a nonconforming store or between two of them often deserves a variance permit, based upon its exceptional environment. It might be unreasonable to insist that the owner could build nothing but a private residence under the existing restrictions. His investment would be a loss for he could not rent his building. But if he is granted a variance permitting a residence with a smaller front yard, or a two-family residence, or a modified business building, he can usually erect an economical structure that will not substantially injure the neighborhood. In the issue of building permits the regular administrative officer, usually the building superintendent or inspector, is supposed to follow the literal provisions of the zoning regulations. Chaos would result if sometimes he followed the regulation and sometimes made a variance according to his own discretion. By establishing the board of appeals a municipality furnishes a forum where an applicant can be heard who thinks he should be allowed some amelioration of the strict letter of the law. From the determination he can appeal to the courts for a judicial review. This board derives its powers from the state legislature, although its appointment is usually made by the local legislature. As it is a discretionary administrative body, and not a legislative body,[1] it must act in making a variance in conformity with general rules of conduct prescribed for it by the state legislature or the council.[2] If the board tries to legislate, its doings are void.[3] It can only pass on applications for permits. Moreover as no two applications

[1] Civil City of Indianapolis v. Ostrom Realty & Const. Co., 95 Ind. A. 376, 176 N. E. 246 (1931)

[2] Fla.—Taylor v. City of Jacksonville, 101 Fla. 1241, 133 S. 114 (1931)
Ill.—Welton v. Hamilton, 344 Ill. 82, 176 N. E. 333 (1931)
La.—Bultman Mortuary Service v. City of New Orleans, 174 La. 360, 140 S. 503 (1932)
Hourgette v. City of Gretna, 18 La. A. 336, 137 S. 344 (1931)

[3] *Full discussion of relation of local legislative body to the Board of Appeals.*
Ind.—Civil City of Indianapolis v. Ostrom Realty & Const. Co., 95 Ind. A. 376, 176 N. E. 246 (1931)
Mo.—Nigro v. Kansas City, 325 Mo. 95, 27 S. W. (2d) 1030 (1930)
N. Y.—Cockcroft v. Miller, 187 App. Div. 704, 176 N. Y. S. 206 (1919)
Sloane v. Walsh, 245 N. Y. 208, 156 N. E. 668 (1927)

Footnote continued on page 122.

are precisely alike, each should be acted on separately. Blanket resolutions by boards of appeals, stating what variances they will make, are always futile. The building inspector cannot base permits on such a resolution or on a prior variance.[1] The legislative acts of a local legislature cannot be reviewed or adjusted by the courts.[2] Within its jurisdiction such a body has equal standing with the courts and its acts are final. If, however, they conflict with the state or federal constitution, the courts can and do declare them null and void. In states that do not have zoning boards of appeals, "spot zoning" becomes the practice of local legislatures.[3] Instead of a variance—in the form of a permit which does not alter the zoning map—the regulations relating to a particular lot are changed to accommodate the needs of the applicant. The court has no power to review or readjust in such a case. The tendency of the local legislature, where there is no board of appeals, is to disregard comprehensive zoning, and the relation of the zoning plan to the health, safety, and general welfare of the community. As years pass by, the increase of "spot zoning" subverts the original soundness of the plan, and tends to produce conditions almost as chaotic as existed before zoning.

Where state enabling acts do not recognize boards of appeals, or where such boards are not given adequate power, difficult situations are sure to arise. Litigation on constitutionality is caused, and is followed by perplexing amendments—all of which would be avoided, and a speedy and adequate remedy afforded, if the usual board of appeals could function.[4]

Footnote continued from page 121.

South Ozone Park Lumber & Supply Corp. v. Board of Appeals of North Hempstead, 229 App. Div. 726, 241 N. Y. S. 810 (1930)
Ugast Realty, Inc. v. Kleinert, 226 App. Div. 752, 233 N. Y. S. 912 (1929)
R. I.—Heffernan v. Zoning Board of Review of Cranston, 49 R. I. 283, 142 A. 479, 50 R. I. 26, 144 A. 674 (1929)

[1] Stein v. Flanagan, 228 App. Div. 668, 239 N. Y. S. 753 (1929)

[2] Neddo v. Schrade, 270 N. Y. 97, 200 N. E. 657 (1936)

[3] Cal.—Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716 (1930)
N. J.—Guaranty Const. Co. v. Town of Bloomfield, 11 N. J. Misc. 613, 168 A. 34 (1933)

[4] Ga.—Smith v. City of Atlanta, 161 Ga. 769, 132 S. E. 66 (1926)
Minn.—American Wood Products Co. v. City of Minneapolis, 35 F. (2d) 657 (1929)

Footnote continued on page 123.

The enabling act usually allows the applicant, or any official, or any aggrieved neighbor to appeal to the board of appeals from any determination of the building inspector. If he has misinterpreted the ordinance, the board of appeals can reverse his decision.[1]

Where the building department has consulted the wrong map and issued a store permit in a residence district, the board of appeals on application of a neighbor will annul the permit.[2]

Usually the board of appeals will affirm the building inspector where the regulation is valid on its face, but there is a tendency of the courts to uphold a board of appeals that reverses an inspector on the ground of invalidity of a regulation.[3] Where the literal enforcement of the regulation will result in practical difficulty or unnecessary hardship to the applicant, the board of appeals in most states can make a variance in his favor and direct a permit. The scope of the board's powers in making such a variance is not unlimited but must accord with the spirit of the ordinance.

A contract vendee can apply for a variance, and presumably he may be an aggrieved neighbor.[4]

Just what constitutes practical difficulty and unnecessary hardship has been variously interpreted by boards of appeals. Some lenient boards have held that if an apartment house would be more

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Footnote continued from page 122.

Loe v. City of Minneapolis, District Court, District of Minnesota, United States Daily, September 22, 1927

Miss.—City of Jackson v. McPherson, 162 Miss. 164, 138 S. 604 (1932)

N. Y.—Hecht-Dann Const. Co. v. Burden, 124 Misc. 632, 208 N. Y. S. 299 (1924)

Leone v. Brewer, 259 N. Y. 386, 182 N. E. 57 (1932)

Merritt v. Isbister, 215 App. Div. 838, 213 N. Y. S. 858 (1926)

Union Railway Company v. Village of Pelham, Supreme Court, Westchester County, March 13, 1925

Voelcker v. Weber, Supreme Court, Nassau County, New York Law Journal, February 9, 1929

Tex.—City of San Antonio v. Zogheib, 70 S. W. (2d) 333 (1934)

[1] Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)

Mass.—Harper v. Board of Appeal of Boston, 271 Mass. 482, 171 N. E. 430 (1930)

N. Y.—Voelcker v. Weber, Supreme Court, Nassau County, New York Law Journal, February 9, 1929

[2] Breese v. Hutchins, 11 N. J. Misc. 74, 165 A. 94 (1933)

[3] Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)

N. J.—Dorsey Motors, Inc. v. Davis, 13 N. J. Misc. 620, 180 A. 396 (1935)

153 East 87th St. Corp. v. Walsh, Supreme Court, New York County, New York Law Journal, July 23, 1929, affd. 228 App. Div. 614, 237 N. Y. S. 850 (1929)

profitable than a one-family house on a corner lot in a one-family detached-house district, the applicant would be allowed a variance to erect an apartment house, on the ground that refusal would cause unnecessary hardship. Where public garages were prohibited in business districts, they have been allowed by a variance permit on the ground that the locality is at a standstill and that it is an unnecessary hardship to require the owner to pay taxes and allow him to earn nothing on his land. The courts have, however, gradually concluded that the deprivation of better earning by means of a nonconforming use is not an unnecessary hardship within the meaning of the law. Value is not the proper criterion. But where the environment is such that the lot cannot profitably be used for a conforming use the board can properly grant a variance permit.[1] If, for instance, in a one-family detached-house district a vacant lot is surrounded by nonconforming apartment houses built before the zoning, a variance for an apartment house can be made. Similarly, if a vacant lot is surrounded with garages and gasoline stations, a public garage variance permit might properly be granted. Where a lot was in a single ownership before the zoning, and is too small for the required yards, a variance permit may be made on the grounds of unnecessary hardship. Where half of a unit building designed to cover a block front was completed before the zoning, and did not conform to the roof setback requirements of the ordinance, a variance on the ground of unnecessary hardship was properly granted to construct the complementary half with the same design.

The practical difficulty and unnecessary hardship must inhere in the land sought to be built upon. The needs of the surrounding lands or houses do not constitute a basis for the variance. The New York Board of Appeals granted a variance for several stores under a proposed apartment house on the ground that there were

[1] Colo.—City of Colorado Springs v. Miller, 95 Colo. 337, 36 P. (2d) 161 (1934)
Mont.—Freeman v. Board of Adjustment of Great Falls, 97 Mont. 342, 34 P. (2d) 534 (1934)
N. Y.—Fordham M. R. Church v. Walsh, 244 N. Y. 280, 155 N. E. 575 (1927)
Reilly v. Carteright, Supreme Court, Westchester County, New York Law Journal, April 10, 1935
Ward v. Murdock, 247 App. Div. 808, 286 N. Y. S. 280 (1936)
Pa.—Fleming v. Board of Adjustment of Prospect Park, 318 Pa. 582, 178 A. 813 (1935)

no stores near, that the surrounding homes needed a business center, and that it was a hardship to deprive them of it. Plainly this was no basis for a variance. Only the local legislative body could change the map and allow a new business center. It was a legislative matter and not a situation for a variance permit.[1]

Thus far the discussion has referred to appeals under the provisions of the enabling act and variances on account of practical difficulty and unnecessary hardship. State enabling acts have, however, recognized that each municipality will desire to have exceptional cases peculiar to itself submitted to the discretion of the board of appeals. Public garages, for example, were a special problem in New York City. They were excluded from business districts, but it was recognized that in some portions of business streets they could be allowed without substantial injury. Some discretionary body, naturally the board of appeals, should decide what locations were proper. Therefore the enabling act provided that the building zone resolution might specify situations of this sort, with rules of conduct; and it would then become the duty of the board of appeals to approve or reject applications within these situations. Accordingly the building zone resolution provided that if there was already a public garage in a business district between two intersecting streets the board might grant a variance permit for another. Theoretically at least this was not an appeal, but a direct application to the board for a variance not on the ground of practical difficulty and unnecessary hardship, but under the rule of conduct established for that situation. The situations so specified in the ordinance are usually said to comprise the original jurisdiction of the board of appeals, as distinguished from the appellate jurisdiction conferred upon it under the state enabling act. In practice, however, the application is usually made to the building inspector. He refuses the permit and passes the matter on to the board of appeals, on request of the applicant who files a paper in the nature of an appeal. In other words, the mechanics of invoking the original

[1] Van Cortlandt Avenue, Bronx, case, Bulletin of the Board of Standards and Appeals, February 11, 1930
N. Y.—Mamaroneck Commodore, Inc. v. Bayly, 233 App. Div. 741, 250 N. Y. S. 767, affd. 260 N. Y. 528, 184 N. E. 79 (1932)
Pa.—Matter of Johnston, Court of Common Pleas, Cambria County, Johnstown, December Term, 1926

jurisdiction is the same as in the appellate jurisdiction. This procedure makes no trouble. It has the advantage of simplicity and makes it possible to join an allegation of unnecessary hardship with the particular grounds stated in the ordinance itself.

Another field of original jurisdiction in the New York building zone resolution was that created by the 80 percent consent clause for public garages. After the original resolution was adopted complaint arose in some large residential districts, especially in the suburbs, that the inhabitants could not obtain storage places for their automobiles. This was especially the case with apartment house dwellers in new sections. They pointed out that there were no industrial districts nearby—where public garages could be built as a matter of right—and that their new business streets contained no garages built before the zoning. As a result a new field of original jurisdiction was introduced in the building zone resolution by amendment. It was provided that in any kind of district a person intending to erect a public garage might ask the board of appeals to lay out a district of possible injury around it; then if the applicant could obtain and file the consents of the owners of 80 percent of the street frontage in this district, the board of appeals could grant or refuse the application.[1] This method has been widely followed in other cities. It is not open to the objection that the variance is granted by property owners. The power of the board is simply limited to cases where the 80 percent consent is filed. It is the determination of the board that gives effect to the variance.

The fields of original jurisdiction enumerated in ordinances are not the same in all municipalities. These fields are essentially different from those in which appeals are heard under the general rule of practical difficulty and unnecessary hardship. They are created by regulations which set forth the instances in which the board of appeals may vary the application of the strict letter of the law.[2]

[1] Healy v. Leo, 194 App. Div. 973, 185 N. Y. S. 948 (1920)

[2] Beinert v. Miller, 188 App. Div. 113, 176 N. Y. S. 398 (1919). This is one of the earliest reported cases on original jurisdiction and contains an excellent analysis of variance of the application of the regulation. The legal philosophy embodied in the words "vary the application" as used in the New York City charter would seem to be more fundamental than in the words "special exceptions" used in the Standard Enabling Act put out by the Department of Commerce.

Footnote continued on page 127.

It is not necessary or desirable to repeat the provisions of the state enabling act or to have the ordinance set forth practical difficulty and unnecessary hardship as part of a rule of conduct. Even if the board of appeals is not mentioned in the ordinance, the municipality can appoint such a body, and it can function in all appeals. The relationship of the state enabling act and the municipal zoning ordinance on these subjects is so intimate and important that for convenience it is well to bind the act in the same book with the ordinance.

Each variance must stand on its own feet. No two cases are exactly alike. Accordingly, boards of appeals should not in every case follow an established system of precedents. A decision is not justified because it follows a prior decision on what was apparently the same environment. Courts uphold boards of appeals in discriminating regarding the merits of each case, and do not criticize them because two instances apparently the same are decided differently. In many cases the board of appeals views the premises, and distinctions may presumably be based on that intimate knowledge.[1]

Footnote continued from page 126.

Md.—North Baltimore M. P. Church v. Board of Zoning Appeals, Baltimore City Court, Baltimore Daily Record, June 24, 1932, 164 Md. 487, 165 A. 703 (1933)

Mo.—Discher v. Stephens, Circuit Court, Webster Groves, March 12, 1928

N. Y.—Adelman v. Connell, 234 App. Div. 871, 253 N. Y. S. 1079 (1931)
Bruckner v. Walsh, 209 App. Div. 909, 205 N. Y. S. 396 (1924)
Facey v. Leo, 110 Misc. 516, 180 N. Y. S. 553, affd. 230 N. Y. 602, 130 N. E. 910 (1921)
Flegenheimer v. Leo, Supreme Court, New York County, New York Law Journal, May 8, 1918, affd. 186 App. Div. 893, 172 N. Y. S. 912 (1918)
Just Estates v. Clarke, 226 App. Div. 812, 234 N. Y. S. 866 (1929)
Leverich Realty Corp. v. Board of Appeals, Supreme Court, Kings County, New York Law Journal, March 3, 1925
MacLean v. Walsh, Supreme Court, Bronx County, New York Law Journal, August 7, 1926
Sheldon v. Board of Appeals of New York, 234 N. Y. 484, 138 N. E. 416 (1923)
West Side Mortgage Co. v. Leo, 174 N. Y. S. 451 (1919)

R. I.—Roberge v. Zoning Board of Review of East Providence, 157 A. 304 (1931)

[1] Mass.—Fandel v. Board of Zoning Adjustment of Boston, 280 Mass. 195, 182 N. E. 343 (1932)

N. Y.—Carl v. Walsh, Supreme Court, Kings County, New York Law Journal, November 8, 1929
Falkenau & Hamershlag, Inc. v. Walsh, 214 App. Div. 705, 209 N. Y. S. 900, affd. 240 N. Y. 688, 148 N. E. 759 (1925)
Mymaud Const. Co. v. Walsh, Supreme Court, Kings County, New York Law Journal, July 21, 1926

A board of appeals is presumed to be composed of experts. Consequently, it is not necessary to take proof and base the determination on it. But in its return the board should state the basis of its determination.[1] Proof offered must not be refused.[2]

In New York City the regulation of tenement houses antedated zoning. Officials desiring to prevent the slightest weakening of the tenement house law succeeded in omitting any provision for appeals to the Board of Appeals from determinations of the Tenement House Commissioner.[3]

Conditions Attached to Variances

Conditions may be imposed on a variance permit, and if the applicant builds under it the owner of the building must observe these conditions as long as the structure stands.[4] The conditions are not limited to the scope of the police power. A common condition is that the side of a building shall be constructed with face brick.

The imposition of conditions often makes a variance lawful that would otherwise be unlawful. No variance is lawful which does precisely what a change of map would accomplish. For instance, a variance permit in a residence district is unlawful if it allows the building to be used for any purpose for which it might be used if in a business district. It would be contrary to the spirit and purpose

[1] N. Y.—Kannensohn Holding Corp. v. Walsh, 120 Misc. 467, 199 N. Y. S. 534 (1923)
Morrone v. Walsh, Supreme Court, Bronx County, New York Law Journal, August 29, 1927, affd. 223 App. Div. 746, 227 N. Y. S. 855 (1928)

[2] Rosoff v. Walsh, 230 App. Div. 789, 244 N. Y. S. 920 (1930)

[3] N. Y.—444 East 57th St. Corp. v. Deegan, 226 App. Div. 507, 235 N. Y. S. 11 (1929)
Joleto Const. Co. v. Martin, Supreme Court, Kings County, New York Law Journal, February 21, 1927
Seigel v. Mann, 208 App. Div. 713, 202 N. Y. S. 946 (1923)

[4] N. J.—Soho Park & Land Co. v. Board of Adjustment of Belleville, 6 N. J. Misc. 686, 142 A. 548 (1928)
N. Y.—Butler v. Connell, 235 App. Div. 806, 256 N. Y. S. 935 (1932)
Guardian Garage, Inc. v. Dorman, 233 App. Div. 771, 250 N. Y. S. 861 (1931)
Helvetia Realty Co. v. Leo, 183 N. Y. S. 37, affd. 231 N. Y. 619, 132 N. E. 912 (1921)
Strolovitz v. Walsh, 227 App. Div. 624, 235 N. Y. S. 860 (1929)
Pa.—Appeal of Consolidated Cleaning Shops, Inc., 103 Pa. Super. 66, 157 A. 811 (1931)
R. I.—Smith v. Zoning Board of Review of Pawtucket, 170 A. 75 (1934)

of the ordinance. To be lawful it must go no further than the need for it reasonably requires. A variance permit for a store building, between two nonconforming stores in a residence district, may be issued on the condition that it shall be used for retail merchandising only, and that the floors above shall be used for residence. By the prudent use of conditions in variances boards can prevent many hardships which would otherwise occur at the edges of districts. For instance, on Peach-tree Avenue, Atlanta, near Peach-tree station of the Southern Railroad, a business district adjoined a one-family detached-house residence district. There was no street between. The brick side of a store marked the division line of the two districts. A variance permit for a building on the plot next to the existing store might have contained conditions requiring a bank or office use of the first floor, a front yard and side yard, a rounded corner, and face brick on the side of the building nearest the private houses. Some arrangement like this would have left the situation far better than before. But the application for a variance was returned with a statement that the board was without jurisdiction. An extremely harmful court decision resulted which prevented use zoning in that state for several years.[1] A board of appeals should always say yes or no to an application for a variance.

Zoning regulations must be based on the health, safety, and general welfare of the community. But the conditions imposed on variance permits are not regulations. They express the protective adaptations necessary to secure the required vote in the board of appeals. They may therefore have an esthetic quality. For instance, a regulation that a gasoline station must be of colonial design is void because not related to health or safety. But a variance allowing the station in a prohibited district could require such design where, for instance, the surrounding houses were colonial.

Ordinances usually provide among the various items of original jurisdiction of the board of appeals that the board may grant variance permits for not more than two years in undeveloped sections.[2] Up to 1931 it was generally considered that no temporary variance could be for more than two years. In that year the New York

[1] Smith v. City of Atlanta, 161 Ga. 769, 132 S. E. 66 (1926)—City of Atlanta v. Smith, 165 Ga. 146, 140 S. E. 369 (1927)

[2] Burke v. Connell, 242 App. Div. 795, 274 N. Y. S. 745 (1934)

Court of Appeals decided that a gasoline station could lawfully be permitted temporarily in an open residence district on a main highway, especially in view of the business depression.[1] Since 1931, accordingly, the Board of Standards and Appeals of New York City, in appeals on the ground of practical difficulty and unnecessary hardship, has granted temporary permits for gasoline stations, quite independently of the above mentioned two-year provision, and has made the period from one to eight years. The corporation counsel has advised the Board that it is lawful to impose a condition of a term of years on such variance permits. It is evident that the owner is able to erect a more substantial and better appearing building if he has eight instead of two years in which to amortize.

A class of variances to which conditions are nearly always attached are those issued for buildings at or near boundaries of districts. In many cases this boundary will be between a business district and a residence district. Sometimes a one-story garage or moving picture theatre is planned to front the business street. The lot may be too shallow to provide sufficient depth and also the required rear yard. In proper cases the board of appeals can allow the new building to obtain additional depth by covering the whole of the rear yard or even extending into the residential district, on the condition, however, that the building shall be only one story high, that there shall be no opening from it other than on the business street, that there shall be no windows, and that light shall be obtained from the roof. The neighbors in the residence district will often prefer to have the unpierced walls of such a building near their homes rather than a rear yard used in connection with the garage or theatre, sometimes with vehicles and workmen causing noise and litter. Cases of this sort arise with churches, stores, markets, and even factories, where the conditions imposed ameliorate or entirely avoid any injury to the adjoining residences or other uses. Of course, the board of appeals will not allow every

[1] N. Y.—St. Albans-Springfield Corporation v. Connell, 257 N. Y. 73, 177 N. E. 313 (1931)
Eckels v. Murdock, 265 N. Y. 545, 193 N. E. 313 (1934)
Gershenhorn v. Murdock, 241 App. Div. 873, 271 N. Y. S. 980 (1934)
Nagaven Realties, Inc. v. Banzhaf, 149 Misc. 361, 267 N. Y. S. 729 (1933)
Noviak Hldg. Corp. v. Murdock, Supreme Court, Queens County, New York Law Journal, August 15, 1934, 243 App. Div. 738, 278 N. Y. S. 118, 268 N. Y. 715, 198 N. E. 572 (1935)

variance requested. Most border-line cases involve injury to adjoining residential buildings. A view of the premises by the board of appeals and the public hearing will usually disclose in what cases a variance on conditions will make the situation better instead of worse.[1]

Rules of Conduct

The board of appeals is not a legislative body. Courts have called it an administrative or quasi-judicial body. It cannot make laws. Its main function is to make variance permits in exceptional cases, subject to court review. In the exercise of this discretion, however, the board of appeals is not left free to make any determinations whatever that it may prefer. It must comply with rules of conduct prescribed by the state legislature, or by the local legislature acting under a direction or permission from the state legislature. This method of leaving to an expert administrative body the determination of details in conformity with rules of conduct laid down by the legislature has grown in this country during the last thirty years. Congress created an Interstate Commerce Commission but did not

[1] In California where variances cannot be made because of the lack of a board of appeals provision in the state enabling act, some other method had to be found to take care of these exceptional cases. The method in vogue is to make "spot zoning" changes with conditions attached. This is tantamount to attaching conditions to a legislative act and should be condemned. The owner of a nonconforming store in a residence district of San Francisco sought to compel a permit, for the enlargement of his store, which would have resulted in a further invasion of the residence district. As there was no board of appeals to make a variance on conditions, there was nothing for the owners to do but to seek a change of the map, which in such cases is usually called "spot zoning." The council refused to make the change and was upheld by the court. Incidentally the court discussed the need of gradually eliminating nonconforming uses. Quite regardless of whether a variance in this case would have been justifiable or not, the absence of a board of appeals shows the lack of adaptability of the California law to exceptional situations. Rehfeld v. City & County of San Francisco, 218 Cal. 83, 21 P. (2d) 419 (1933).

N. Y.—Block Holding Corp. v. Warshaw, 141 Misc. 818, 253 N. Y. S. 321, 237 App. Div. 839, 261 N. Y. S. 914 (1932)

Goebel v. Board of Standards and Appeals, Supreme Court, Bronx County, New York Law Journal, July 17, 1929

Homack Const. Co. v. Walsh, Supreme Court, Kings County, New York Law Journal, August 7, 1925

Ralph Market Peddlers Syndicate v. Walsh, Supreme Court, Kings County, New York Law Journal, April 25, 1922

Reed v. Board of Standards and Appeals, 255 N. Y. 126, 174 N. E. 301 (1931)

R. I.—Syrian Orthodox Charitable Society v. Zoning Board of Review of Pawtucket, 53 R. I. 232, 165 A. 778 (1933)

in the beginning prescribe rules of conduct for its determinations. There was complaint that the Interstate Commerce Act had no teeth. Later Congress gave it the power of determining reasonable rates, adequate service and safe appliances, and penalties were imposed for noncompliance with these regulations. The words "reasonable," "adequate" and "safe" are the rules laid down by Congress. States followed the national government in creating public service commissions having the power to make regulatory determinations within the rules of conduct embodied in the terms "reasonable rates, adequate service, and safe appliances." Congress also passed a law requiring pure foods in interstate commerce and preventing false branding. A bureau was set up in the Department of Agriculture having power to make determinations under the rules of conduct embodied in the requirement of pure food and true branding. The intricacy of modern transportation, industry, and merchandising makes it almost impossible for the federal or state legislative body to prescribe exact laws to fit the details of every situation. The involved schedules of freight rates could hardly be determined by a statute. They often need to be altered between legislative sessions. The legislature is not adapted to taking evidence and passing on these details. It is undoubtedly better to prescribe rules of conduct for an administrative body and require its determinations to be obeyed.

The board of appeals in zoning, from the beginning of the practice in this country, has been required to act within rules of conduct prescribed by the state legislature or by a local legislative body acting under the sanction of the state legislature. The device of such a board had its origin and early development in connection with zoning in New York City. It will be helpful to trace this development from the beginning, as the methods used at that time, and the language employed, have been the foundation of all provisions relating to boards of appeals in zoning throughout the country. Inasmuch as the rule of conduct involved in the words "practical difficulty and unnecessary hardship" originated in New York City, but has been criticized by the courts of Illinois and Maryland as an inadequate rule, it will not be out of place to state with some detail the history of the earliest adoption of the phrase.

Development of the Board of Appeals in the City of New York

The act of the New York legislature granting the Board of Estimate and Apportionment of the City of New York the power to adopt a zoning ordinance—under which the building zone resolution of July 25, 1916, was adopted—is here inserted.[1]

[1] Sections of Greater New York Charter, as Enacted by Chapter 470 of Laws of 1914 and Amended by Chapter 497 of Laws of 1916

Sec. 242–a. The board of estimate and apportionment shall have power to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces. The board may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. The regulations as to the height and bulk of buildings and the area of yards, courts and other open spaces shall be uniform for each class of buildings throughout each district. The regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air and convenience of access. The board shall pay reasonable regard to the character of buildings erected in each district, the value of the land and the use to which it may be put to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations to be enforced therein. Such commission shall make a tentative report and hold public hearings thereon at such times and places as said board shall require before submitting its final report. Said board shall not determine the boundaries of any district nor impose any regulation until after the final report of a commission so appointed. After such final report said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice and hearing amend, supplement or change said regulations or districts, but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board.

Sec. 242–b. The board of estimate and apportionment may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses, and may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. For each such district regulations may be imposed designating the trades and industries that shall be excluded or subjected to special regulations and designating the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare. The board shall give reasonable consideration, among other things to the character of the

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It will be noted that no authority was given for the creation of a board of appeals. The reason was that the Heights of Buildings Commission, which framed the enabling act, did not foresee how necessary such a board would be. For many years there had been a Board of Examiners in the Bureau of Buildings established according to a charter provision. This was a discretionary board having power to ameliorate the harshness of the requirements of the building code. No rule of conduct was prescribed to govern its decisions, and its powers and usefulness were small. For several years before the building zone resolution was passed the city felt an increasing need for the creation of an administrative board with larger discretionary powers relating to buildings. Such a board, it was expected, might unify the administration of numerous state and city requirements which confused the building trade. The result was that the legislature of 1916 amended the city charter by making provision for a Board of Standards and Appeals with power to make rules covering general details of buildings, and also a Board of Appeals. The latter consisted of the appointed members of the first-named Board and one of its ex-officio members. This Board of Appeals was given power to exercise its discretion within limits in granting permits for buildings in exceptional situations, and to review the decisions of the building commissioners. The rule of practical difficulty and unnecessary hardship was prescribed for it

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district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development in accord with a well-considered plan. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations and restrictions to be imposed therein. Such commission shall make a tentative report and hold public hearings thereon before submitting its final report at such time as said board shall require. Said board shall not determine the boundaries of any district nor impose any regulations or restrictions until after the final report of a commission so appointed. After such final report said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice and hearing amend, supplement or change said regulations or districts but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board.

as a rule of conduct. These two boards superseded the former Board of Examiners.

Such was the state of affairs when the building zone resolution was being framed by the zoning commission, officially known as the Commission on Building Districts and Restrictions, which was appointed under the authority of the enabling act. That Commission, appreciating that the recently constituted Board of Appeals was a proper body to turn to for assistance in the administration of the building zone resolution, introduced into the latter (1) certain use-district exceptions under which the Board of Appeals might exercise its discretion in granting permits, (2) certain area-district lot-dimension requirements, subject to the approval of the Board of Appeals, and (3) the general principle that where in a specific case there are practical difficulties or unnecessary hardships in carrying out the strict letter of a provision of the resolution the Board of Appeals should have power to vary the provision, in harmony with its general purpose and intent, so that the public health, safety, and general welfare might be secured and substantial justice done.

The zoning commission erroneously assumed that the Board of Appeals could exercise these functions as outlined because of their similarity to the functions which had been prescribed for that Board in the legislative act of 1916. However, after the building zone resolution was adopted July 25, 1916, one of the first court cases that arose was a certiorari proceeding reviewing a decision of the Board of Appeals regarding a new garage. Justice Russell Benedict of the Supreme Court, Second Department, in the following carefully prepared opinion, which has been considered to state the law accurately in this particular, pointed out that the Board of Appeals could not exercise functions given it by the Board of Estimate unless the state legislature had authorized it to do so:

The board of estimate having been vested by the legislature with the power of framing the regulations and restrictions provided for by the acts of 1914 and 1916, could not, in the absence of express legislative authority, depute to an inferior board the power to dispense in its discretion with compliance with such regulations. If the board of estimate had such a power to be exercised or not in its discretion, it could not delegate such discretion to a subordinate administrative or ministerial board. *Birdsall v. Clark*, 73 N. Y. 73; *Phelps v. City of New York*, 112 id. 216, 220; *Ontario Knitting Co.*

v. State, 205 id. 409, 416. The question has ceased to be of importance for future cases, because of the amendment made this year to section 242-b, which expressly authorizes the board of estimate to confer such power on the board of appeals.

(Beinert v. Miller, 100 Misc. 318, at p. 326.)

Fortunately the corporation counsel and the Zoning Committee foresaw the dangers which were later pointed out by Justice Benedict, and urged the legislature to make an amendment so that the Board of Appeals would be clothed with its proper functions regarding the building zone resolution. Accordingly the state legislature in 1917 amended charter sections 242-a and 242-b by adding the following:

Said regulations shall be enforced by the superintendent of buildings of each borough and the tenement house commissioner, under the rules and regulations of the board of standards and appeals. Said regulations of the board of estimate and apportionment may provide that the board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.

(Chapter 601, Laws of New York 1917.)

The charter provisions in relation to the powers of the Board of Appeals were also amended by adding the following sentence:

They [the board of appeals] shall also hear and decide all matters referred to them or upon which they are required to pass under any resolution of the board of estimate and apportionment adopted pursuant to sections two hundred and forty-two-a and two hundred and forty-two-b of this chapter.

(Greater New York Charter, Sec. 718-d.)

Thus the City of New York at last obtained the Board of Appeals as an adjunct to its zoning plan. Because the law in its entirety is the growth of many decades, because it was adapted carefully to supplement the zoning plan, because it has been repeatedly passed upon by the courts, and because parts of it have been copied in the zoning laws of many states, it is here included in so far as it related (in 1920) to zoning and the Board of Appeals.[1]

[1] CHAPTER XIV–A OF THE CHARTER OF THE CITY OF NEW YORK, AS IT EXISTED IN 1920

Board of standards and appeals.

Sec. 718. 1. Constitution and appointment. The board of standards and appeals is hereby established. The words "the board" when used in this chapter

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refer to said board. It shall consist of the fire commissioner, the superintendents of buildings, the chief of the uniformed force of the fire department and six other members to be appointed by the mayor who are hereinafter referred to as the appointed members. Of the appointed members first appointed by the mayor, two shall be appointed for terms of one year, two for terms of two years and two for terms of three years, and annually thereafter the mayor shall appoint two members for terms of three years each. At all times there shall be among the appointed members of the board persons qualified as follows: one, other than the chairman, shall have had not less than ten years' experience as an architect; one, other than the chairman, shall have had not less than ten years' experience as a structural engineer; one, other than the chairman, shall have had not less than ten years' practical experience as a builder. The mayor shall designate one of the appointed members of the board as chairman and shall also appoint a secretary. The board shall appoint a chief clerk and such other subordinates as may be needed, who shall receive such compensation as may be provided pursuant to law. The clerk of the board of examiners is hereby transferred to the position of chief clerk of the board of standards and appeals. The chairman of the board shall be an architect or structural engineer of at least fifteen years' experience; he shall receive such annual compensation as shall be fixed by the board of aldermen upon the recommendation of the board of estimate and apportionment, he shall act as chairman of the board and of the board of appeals, and he shall not be engaged in any other occupation, profession or employment. The appointed members of the board other than the chairman shall receive such compensation as may be fixed by the board of aldermen upon the recommendation of the board of estimate and apportionment for each attendance at a meeting of the board.

2. Removal and filling vacancies. The mayor shall have power to remove any appointed member of the board, and the secretary of the board, and to fill vacancies occurring by such removal or other cause. Vacancies shall be filled for the unexpired term of the member whose place has become vacant.

3. Meetings. Meetings of the board and of the board of appeals shall be held at the call of the chairman and at such other times as such boards may determine. Such chairman or in his absence the acting chairman may administer oaths and compel the attendance of witnesses. All meetings of such boards shall be open to the public. Each board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official action.

4. Bulletin; filing and publication of decision. Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision or determination of the board and of the board of appeals shall immediately be filed in the office of the board and shall be a public record. The board shall print and publish monthly or oftener at its option, a bulletin in which it shall publish every rule, regulation, every amendment or repeal thereof made by the board, and every order, requirement, decision and determination of the board of appeals, and the reasons therefor whenever it shall deem it practical to do so, and such other matters, including indices and digests, as the board may deem it advisable to publish.

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Board of appeals.

Sec. 718-d. The appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, exclusive of the other members, shall hear and decide appeals from and review any rule, regulation, amendment or repeal thereof, order, requirement, decision or determination of a superintendent of buildings made under the authority of title two of chapter nine

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of this act or of any ordinance or of the fire commissioner under the authority of title three of chapter fifteen of this act or of any ordinance, or of the labor law. They shall also hear and decide all matters referred to them or upon which they are required to pass under any resolution of the board of estimate and apportionment adopted pursuant to sections two hundred and forty-two-a and two hundred and forty-two-b of this chapter. No member of the board shall pass upon any question in which he or any corporation in which he is a stockholder or security holder is interested.

Hearings on appeals shall be before at least five members of the board of appeals, and the concurring vote of five members of the board of appeals shall be necessary to a decision.

The words board of appeals when used in this chapter refer to the said appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, when acting under the powers conferred by this section.

Inspections.

Sec. 718–e. Whenever the board of appeals shall deem it necessary that an inspection shall be made of any building, structure or vessel which is the subject of an appeal from an order, requirement, decision or determination of the fire commissioner, the chairman of the board and not less than two members of the board of appeals designated by the chairman shall visit and inspect such building, structure or vessel, and shall report their findings to the board of appeals in writing. The members other than the chairman shall receive for each visit or inspection, and for attendance at meetings of the board of appeals, the same compensation as is paid to appointed members for attendance at meetings of the board of standards and appeals.

Appeals.

Sec. 719. 1. What appealable. An appeal may be taken to the board of appeals from any order, requirement, decision or determination made by any superintendent of buildings under the authority of title two of chapter nine of this act or of any ordinance (except an order requiring an unsafe building, staging or structure to be made safe, and except an order punishing, removing or dismissing an employee, inspector or other subordinate), or made by the fire commissioner under the authority of title three of chapter fifteen of this act or of any ordinance, and from any rule, regulation, amendment or repeal thereof relating to the construction, alteration, structural changes in, equipment, occupancy or use of any building or structure, or vaults and sidewalks appurtenant thereto.

2. Who may appeal. Such appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the city.

3. Appeal how taken. Such appeal shall be taken within such time as shall be prescribed by the board of appeals by general rule, by filing with the officer from whom the appeal is taken and with the board of appeals of a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

4. Stay. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the

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supreme court, on application, on notice to the officer from whom the appeal is taken and on due cause shown.

5. Hearing of and decision upon appeal. The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties, and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law, the board of appeals shall have power in passing upon appeals, to vary or modify any rule or regulation or the provisions of any existing law or ordinance relating to the construction, structural changes in, equipment, alteration or removal of buildings or structures, or vaults and sidewalks appurtenant thereto, so that the spirit of the law shall be observed, public safety secured and substantial justice done. The board of appeals shall not vary or modify the tenement house law nor any rule, regulation or ruling of the tenement house commissioner. The decision shall be in writing and shall be filed in the office of the board and promptly published in the bulletin of the board. Each decision shall so far as is practicable be in the form of a general statement or resolution which shall be applicable to cases similar to or falling within the principles passed upon in such decision.

6. Review by board of appeals on its own motion. Any rule, regulation, amendment or repeal thereof and any order, requirement, decision or determination from which an appeal may be taken to the board of appeals under the provision of this section, may be reviewed by the board of appeals, upon motion of any member thereof, but no such review of a decision upon an appeal shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified. The provisions of this chapter relating to appeals to the board of appeals shall be applicable to such review.

Certiorari to review decision of board of appeals.

Sec. 719-a. 1. Petition. Any person or persons, jointly or severally aggrieved by any decision of the board of appeals upon appeal or review had under section seven hundred and nineteen, or any officer, department, board or bureau of the city, or the industrial commission of the labor department of the state, may present to the supreme court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board, or its publication in the bulletin.

2. Writ of certiorari. Upon the presentation of such petition, the justice or court may allow a writ of certiorari directed to the board of appeals to review such decision of the board of appeals and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court or a justice thereof. Such writ shall be returnable to a special term of the supreme court of the judicial district in which the property affected, or a portion thereof, is situated. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

3. Return to writ. The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or

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During the period while the charter provisions relating to the Board of Appeals were being perfected the Board of Estimate and Apportionment made minor amendments to the parts of the building zone resolution which refer to the Board of Appeals. Those parts, as so amended, are given in the note.[1]

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sworn copies thereof or of such portions thereof as may be called for by such writ. The return must concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and must be verified.

4. Proceedings upon return. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

5. Costs. Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from.

6. Preferences. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.

Penalty for non-compliance with orders, et cetera, of board, of superintendents of buildings and of fire commissioner.

Sec. 719–b. Any person who shall knowingly violate or fail to comply with any lawful order or requirement of the board made under the authority of this chapter or of a superintendent of buildings made under the authority of title two of chapter nine of this act or of the fire commissioner made under the authority of title three of chapter fifteen of this act, shall be guilty of a misdemeanor; and shall in addition thereto, and in addition to all other liabilities and penalties imposed by law, ordinances, rules and regulations, forfeit and pay for each and every such violation and non-compliance respectively, a penalty in the sum of not more than two hundred and fifty dollars, as may be fixed by the court awarding judgment therefor. An action may be brought for the recovery of any such penalty or penalties in any municipal court or court of record in said city in the name of the city.

[1] Extracts from New York City Building Zone Resolution as it Existed in 1919

Sec. 7. Use District Exceptions. The Board of Appeals, created by chapter 503 of the laws of 1916, may, in appropriate cases, after public notice and hearing, and subject to appropriate conditions and safeguards, determine and vary the application of the use district regulations herein established in harmony with their general purpose and intent as follows:

(a) Permit the extension of an existing building and the existing use thereof upon the lot occupied by such building at the time of the passage of this resolution or permit the erection of an additional building upon a lot occupied at the time of the passage of this resolution by a commercial or industrial establishment and which additional building is a part of such establishment;

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(b) Where a use district boundary line divides a lot in a single ownership at the time of the passage of this resolution, permit a use authorized on either portion of such lot to extend to the entire lot, but not more than 25 feet beyond the boundary line of the district in which such use is authorized;

(c) Permit the extension of an existing or proposed building into a more restricted district under such conditions as will safeguard the character of the more restricted district;

(d) Permit in a residence district a central telephone exchange or any building or use in keeping with the uses expressly enumerated in section 3 as the purposes for which buildings or premises may be erected or used in a residence district;

(e) Permit in a business district the erection or extension of a garage or stable in any portion of a street between two intersecting streets in which portion there exists a garage for more than five motor vehicles or a stable for more than five horses at the time of the passage of this resolution;

(f) Grant in undeveloped sections of the city temporary and conditional permits for not more than two years for structures and uses in contravention of the requirements of this article;

(g) Permit in a business or residence district the erection of a garage provided the petitioner files the consents duly acknowledged of the owners of 80 per cent. of the frontage deemed by the Board to be immediately affected by the proposed garage. Such permit shall specify the maximum size or capacity of the garage and shall impose appropriate conditions and safeguards upon the construction and use of the garage.

Sec. 20. Rules and Regulations; Modifications of Provisions. The Board of Standards and Appeals, created by chapter 503 of the laws of 1916, shall adopt from time to time such rules and regulations as they may deem necessary to carry into effect the provisions of this resolution. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the board of appeals shall have power in a specific case to vary any such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done. Where the street layout actually on the ground varies from the street layout as shown on the use, height or area district map, the designation shown on the mapped street shall be applied by the Board of Appeals to the unmapped streets in such a way as to carry out the intent and purpose of the plan for the particular section in question. Before taking any action authorized in this section the Board of Appeals shall give public notice and hearing.

No garage for more than five cars may be erected or extended and no building not now used as a garage for more than five cars may have its use changed to a garage for more than five cars on any portion of a street between two intersecting streets in which portion there exists an exit from or an entrance to a public school; or in which portion there exists any hospital maintained as a charitable institution; and in no case within a distance of 200 feet from the nearest exit from or entrance to a public school; nor within two hundred feet of any hospital maintained as a charitable institution. This protection shall also apply to duly organized schools for children under 16 years of age, giving regular instruction at least five days a week for eight months or more each year, owned and operated by any established religious body or educational corporation. This limitation on the location of garages shall apply to unrestricted as well as business and residence districts; but in no case shall it apply to cases where applications for the erection or extension of garages or the conversion of existing buildings into garages may be pending before the Board of Appeals at the time of the adoption of this resolution.

Interpretation of Rules of Conduct

The rule of practical difficulty and unnecessary hardship, in the charter of the City of New York, was copied in the zoning enabling acts of a considerable number of states. In 1924 Herbert Hoover, then Secretary of Commerce, issued the so-called "Standard State Zoning Enabling Act," under which municipalities might adopt zoning regulations. This form advised the use of practical difficulty and unnecessary hardship as the rule for boards of appeals. The phraseology differs somewhat from that used in the New York charter but the intention of the framers was that the meaning should be the same. The following is the rule in the Standard Act:

> To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done.

Following the publication of the Standard Act this rule of conduct for zoning boards of appeals was adopted throughout the country. With the exception of the courts of Illinois and Maryland it has been considered adequate in all states where it has been passed upon. Nevertheless boards of appeals have frequently failed to recognize the binding force of the rule, and quite regardless of its proper scope have issued variance permits in cases where they thought that little or no harm was done thereby or where they thought they were doing substantial justice. Courts have repeatedly pointed out that applications for variance permits must be decided according to the rules, and that the board of appeals, inasmuch as it is not a legislative body, is not at liberty to decide what is best for the individual or for the community.

The zoning maps of a village near New York divided residence areas into A districts in which detached one-family houses could be built and B districts in which multi-family houses were allowed. To the surprise of the author when he went to this village as an arbitrator in a zoning dispute he was informed in response to his questions that no new multi-family houses had been built in a B district since the adoption of the zoning ordinance. It was ex-

plained that all the builders of apartment houses wanted to place them in the detached one-family-house district and therefore applied to the Board of Appeals for variance permits. In the majority of cases these were granted on the ground of practical difficulty and unnecessary hardship. The Board of Appeals erroneously considered that if the applicant was able to show that he could earn a better income from the land by building a multi-family house that showing was enough to entitle him to a variance. Courts in nearly all states have held that this is a mistake. The board of appeals should only grant variance permits under this rule where the environment of the lot in question is such that its situation is exceptional and such that a conforming building would be undesirable or unprofitable. Added to this must be the element that the new building and use, although exceptional, will harmonize with the spirit and purpose of the ordinance.

Departure from the strict letter of the zoning ordinance can often be allowed under this rule. Height regulations prescribe an envelope outside of which the structure shall not extend. Nevertheless variances can frequently be allowed where economies can be obtained without a sacrifice of light and air. Court and yard requirements can frequently be varied where by reason of the exceptional location of the building, the total open spaces can be so disposed as to make them equivalent to the specifically required open spaces in their total amount and effect. Experience has shown that height regulations have an intimate relation to area regulations and in certain exceptional cases a variance may be made in one of these requirements and allowed for in the other. Height and area regulations control the bulk of the building and therefore are sometimes partly interchangeable.

It may happen that half of a proposed building was erected before the ordinance went into effect and it is desired to complete the unit later by building the other half. In cases of this sort, where the harmonious completion of the structure would require variations from the original design, it has been considered justifiable to grant a variance permit on the ground of practical difficulty and unnecessary hardship. The Western Union Telegraph Company building on the west side of Broadway between Dey and Fulton Streets was designed to cover the entire block front, but only the

southerly half was built before the New York building zone resolution went into effect. Later it was desired to build the northerly half, but the setback requirement of the height regulations prevented carrying out the design which had uniform height throughout. If the required setting back of the new half had been insisted upon, this structure as a whole would have been an architectural monstrosity. To this consideration was added the fact that St. Paul's burying ground was opposite on the north which would probably remain as a permanent open space, giving light to the new northerly half of the building. It was therefore deemed justifiable under the rule of practical difficulty and unnecessary hardship to make a variance permit allowing the building to be completed as a harmonious whole.

In 1931 the highest court of Illinois held that the rule of practical difficulty and unnecessary hardship is inadequate.[1] It is difficult to conceive of words which might be used to express what that court would regard as a sufficient rule. If the word "reasonable" in the requirement of a reasonable rate for transportation supplies an adequate rule, one wonders how it is that the words "practical difficulty and unnecessary hardship" in the field of construction fail to supply such a rule. After this decision was handed down municipalities in Illinois were at a loss how to provide for exceptional situations in the issue of building permits.[2] They saw no way other than to have their local legislative bodies alter the maps, spot by spot. Strictly speaking, this method does not create variances in the permits. A permanent change is made in the zoning of the land itself in order to allow the particular exceptional building.

The Illinois court also declared that it was not lawful for the state legislature to grant municipalities the power to submit special exceptions to the board of appeals in the ordinance itself. Consequently all discretionary power of varying the strict letter of the law in exceptional cases seems to have been taken away from the board of appeals in Illinois. Probably, however, the board still has

[1] Welton v. Hamilton, 344 Ill. 82, 176 N. E. 333 (1931)

[2] The two following cases illustrate the ineffectiveness of regulation by court declarations of unconstitutionality. The Welton decision denied the power of boards of appeals as constituted to make variances.
Ill.—Kirby v. City of Rockford, 363 Ill. 531, 2 N. E. (2d) 842 (1936)
Reschke v. Village of Winnetka, 363 Ill. 478, 2 N. E. (2d) 718 (1936)

the power to reverse the building inspector where he has made a mistake of law.

The state legislature of Illinois later tried to remedy this situation by amending the state enabling act so that public hearings could be held before the board of appeals, even though the actual variance had to be made by the local legislative body. Accordingly, until this defective system of caring for special exceptions is remedied in some way, Illinois will be in the same position as California, Oregon, and Washington, the enabling acts of which make no provision for a board of appeals. In those states exceptional situations are cared for by the spot zoning method. In operation this method is not satisfactory, partly because local legislative bodies, not being subject to court review, are prone to make irrational spot changes in the zoning maps, partly because neighbors are without any remedy to prevent unreasonable changes, and partly because the zoning map after it has been subjected to innumerable spot changes ceases to have any substantial relation to the health, safety, morals, and general welfare of the community. The result is unfortunate in comparison with the situation in states where boards of appeals can grant variance permits under the usual rules of conduct, and where necessary variance permits can be made from time to time without any alteration of the legal status of the land, as shown by the zoning maps. Los Angeles, for instance, by reason of being deprived of this method of permitting variances makes about eight times as many map changes each year as New York City.

In 1933 the highest court of the state of Maryland[1] disapproved of the rule of practical difficulty and unnecessary hardship, following substantially the reasoning of the Illinois court. Accordingly, since that year boards of appeals in Maryland have reported desired variances to the local legislative body for action, thus beginning spot zoning in the state. In their zoning ordinances, however, municipalities may still indicate situations wherein the board of appeals can make special exceptions, under rules of conduct provided in the ordinance itself.

In practically all states it now seems well established that boards of appeals can grant variance permits under the usual rules of

[1] Sugar v. North Baltimore Methodist Protestant Church, 164 Md. 487, 165 A. 703 (1933)

conduct, including practical difficulty and unnecessary hardship,[1] subject to court review by proceedings in the nature of certiorari. The line is sharply drawn between the zoning ordinance—which is exclusively passed and shaped by the local legislative body—and

[1] Conn.—Lathrop v. Town of Norwich, 111 Conn. 616, 151 A. 183 (1930)
Ga.—Fauss v. McConnell, 172 Ga. 444, 157 S. E. 625 (1931)
Ill.—Lucas v. Hamilton, 259 Ill. A. 148 (1930)
Ind.—Dollman v. Osbon, Marion Circuit Court, Indianapolis, May 3, 1928
Kaspar v. Board of Zoning Appeals, Circuit Court, Marion County, Indianapolis, April 30, 1926
Major v. Board of Zoning Appeals, Circuit Court, Marion County, Indianapolis, September 7, 1928
Iowa—Zimmerman v. O'Meara, 215 Iowa 1140, 245 N. W. 715 (1932)
Ky.—Carrithers v. City of Louisville, Jefferson Circuit Court, Chancery Branch, Second Division, March 12, 1932, 250 Ky. 462, 63 S. W. (2d) 493 (1933)
Md.—Convention of Protestant Episcopal Church v. Mayor and City Council of Baltimore, Baltimore City Court, Baltimore Daily Record, October 17, 1928
—Greenway Apartment Company v. Convention of Protestant Episcopal Church, 280 U. S. 525, 50 S. Ct. 87 (1929)
Jack Lewis, Inc. v. Mayor and City Council of Baltimore, 164 Md. 146, 164 A. 220, 290 U. S. 585, 54 S. Ct. 56 (1933)
Mass.—Amero v. Board of Appeal of Gloucester, 283 Mass. 45, 186 N. E. 61 (1933)
Coleman v. Board of Appeal of Boston, 281 Mass. 112, 183 N. E. 166 (1932)
Hammond v. Board of Appeal of Springfield, 257 Mass. 446, 154 N. E. 82 (1926)
Phillips v. Board of Appeals of Springfield, 286 Mass. 469, 190 N. E. 601 (1934)
Mich.—Beardsley v. Evangelical Lutheran Bethlehem Church, 261 Mich. 458, 246 N. W. 180 (1933)
Mo.—Nigro v. Kansas City, 325 Mo. 95, 27 S. W. (2d) 1030 (1930)
Neb.—City of Lincoln v. Foss, 119 Neb. 666, 230 N. W. 592 (1930)
N. Y.—*Prevalence of odors not grounds.* Arverne Bay Construction Company v. Murdock, 247 App. Div. 889, affd. 271 N. Y. 631 (1936)
Brady v. Walsh, Supreme Court, New York County, New York Law Journal, April 26, 1926
Dempsey v. Murdock, 241 App. Div. 64, 271 N. Y. S. 9 (1934)
Durning v. Reville, 137 Misc. 173, 241 N. Y. S. 539, affd. 232 App. Div. 790, 249 N. Y. S. 908 (1931)
Esdora Realty Corp. v. Walsh, 229 App. Div. 866, 243 N. Y. S. 810, affd. 254 N. Y. 600, 173 N. E. 883 (1930)
Finger v. Connell, Supreme Court, Bronx County, New York Law Journal, May 27, 1932
Forman v. Walsh, Supreme Court, Kings County, New York Law Journal, February 24, 1926
Fort Lee Ferry Garage Co. v. Board of Standards and Appeals, Supreme Court, New York County, New York Law Journal, August 9, 1929, affd. 228 App. Div. 608, 237 N. Y. S. 775 (1929)
Inconvenience, expense, and economic advantage not proper criteria in garage variance. 4672 Broadway Corp. v. Board of Standards and Appeals, 225 App. Div. 97, 232 N. Y. S. 266, affd. 250 N. Y. 571, 166 N. E. 328 (1929)
Garden Properties, Inc. v. Board of Appeals of New Rochelle, Supreme Court, Westchester County, Westchester Law Journal, October 11, 1933
Personal gain not grounds for garage variance. Gillman v. Walsh, 225 App. Div. 671, 231 N. Y. S. 755 (1928)

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Footnote continued from page 146.

Goldenberg v. Walsh, 215 App. Div. 396, 213 N. Y. S. 578, 242 N. Y. 576, 152 N. E. 434 (1926)

Grilli v. Gonnoll, Supreme Court, Kings County, New York Law Journal, February 26, 1932

Gross v. Walsh, 213 App. Div. 878, 209 N. Y. S. 900 (1925); Supreme Court, Kings County, New York Law Journal, July 8, 1925, affd. 215 App. Div. 839, 213 N. Y. S. 884 (1926)

Hayman v. Walsh, 223 App. Div. 722, 226 N. Y. S. 883, affd. 248 N. Y. 586, 162 N. E. 534 (1928)

Hendrick v. Board of Standards and Appeals, Supreme Court, New York County, New York Law Journal, June 20, 1929

Leider v. Walsh, Supreme Court, Queens County, New York Law Journal, April 23, 1930

Mamaroneck Commodore, Inc. v. Bayly, 233 App. Div. 741, 250 N. Y. S. 767, affd. 260 N. Y. 528, 184 N. E. 79 (1932)

McAvoy v. Leo, 109 Misc. 255, 178 N. Y. S. 513 (1919)

Montalbine v. Walsh, Supreme Court, Kings County, New York Law Journal, October 31, 1929

Mymaud Const. Co. v. Walsh, Supreme Court, Kings County, New York Law Journal, July 21, 1926

Party must make proof before board of appeals. Nostrand Holding Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, September 3, 1929

Ozark Realty Corp. v. Connell, Supreme Court, Kings County, New York Law Journal, January 4, 1933

Palazzolo v. Walsh, Supreme Court, Bronx County, New York Law Journal, October 23, 1924

Parry v. Walsh, 121 Misc. 631, 202 N. Y. S. 48, affd. 209 App. Div. 889, 205 N. Y. S. 945 (1924)

People v. Snedeker, Supreme Court, Nassau County, New York Law Journal, December 1, 1932

People v. Walsh, Supreme Court, Kings County, New York Law Journal, October 11, 1924

People v. Walsh, Supreme Court, New York County, New York Law Journal, July 1, 1925

Pounds v. Walsh, 129 Misc. 676, 223 N. Y. S. 459, affd. 248 N. Y. 591, 162 N. E. 537 (1928)

Proc Bldg. Corp. v. Connell, Supreme Court, Kings County, New York Law Journal, March 11, 1933, 240 App. Div. 782, 266 N. Y. S. 903, affd. 264 N. Y. 513, 191 N. E. 541 (1934)

Reynolds v. Clarke, Supreme Court, Westchester County, January 29, 1925

Rock Jay Realty Co. v. Murdock, Supreme Court, Kings County, New York Law Journal, March 2, 1935, 247 App. Div. 730, 286 N. Y. S. 1021 (1936)

Rothfield v. Walsh, Supreme Court, Kings County, New York Law Journal, June 1, 1928

Rutland Parkway, Inc. v. Walsh, 227 App. Div. 621, 235 N. Y. S. 874 (1929)

St. Basil's Church v. Kerner, 125 Misc. 526, 211 N. Y. S. 470 (1925)

Shalex Realty Co. v. Connell, Supreme Court, New York County, New York Law Journal, July 8, 1932

Stevens v. Clarke, 216 App. Div. 351, 215 N. Y. S. 190 (1926)

Thall v. Walsh, Supreme Court, Kings County, New York Law Journal, June 30, 1926

Tishman Realty & Const. Co. v. Walsh, 135 Misc. 315, 237 N. Y. S. 237, affd. 228 App. Div. 687, 239 N. Y. S. 759 (1930)

Footnote continued on page 148.

variances in exceptional permits, which can be determined only by boards of appeals, subject to court review. The result is excellent because local legislative bodies should not be burdened with detail adjustments of specific buildings, and the appointed discretionary board of appeals should not have authority to change the fundamental maps.

Limitation of the Powers of the Board of Appeals in the City of New York

It will be noted that the charter and the building zone resolution of the City of New York did not make the Board of Appeals a court to exercise discretion over the entire field of zoning. It has the following powers regarding zoning and no more:

(a) To rectify on appeals the errors of building superintendents and other administrative officials in passing on applications for permits;
(b) to decide border-line and exceptional cases, where specified in the ordinance;
(c) To vary the literal requirements of the law in individual cases where unnecessary and excessive hardship is caused and the intention of the law is equally accomplished by an alternative method to be prescribed by the Board of Appeals.

Observers of the Board of Appeals in action constantly complain that it is prone to magnify its powers under the unnecessary hard-

Footnote continued from page 147.

Young Women's Hebrew Association v. Board of Standards and Appeals, 266 N. Y. 270, 194 N. E. 751, 296 U. S. 537, 56 S. Ct. 109 (1935)
Ohio—Neithamer v. Heyer, 39 Oh. A. 532, 177 N. E. 925 (1931)
Pa.—Appeal of Armstrong, Court of Common Pleas, Allegheny County, October Term, 1924
Gilfillan's Permit, 291 Pa. 358, 140 A. 136 (1927)
Kerr's Appeal, 294 Pa. 246, 144 A. 81 (1928)
Ward's Appeal, 289 Pa. 458, 137 A. 630 (1927)
R. I.—Drabble v. Zoning Board of Review of Providence, 52 R. I. 228, 159 A. 828 (1932)
East Providence Mills v. Zoning Board of Review of East Providence, 51 R. I. 428, 155 A. 531 (1931)
Harrison v. Hopkins, 48 R. I. 42, 135 A. 154 (1926)
Heffernan v. Zoning Board of Review of Cranston, 49 R. I. 283, 142 A. 479 (1928), 50 R. I. 26, 144 A. 674 (1929)
McCabe v. Zoning Board of Review of Providence, 50 R. I. 449, 148 A. 601 (1930)
Morgan v. Zoning Board of Review of Warwick, 52 R. I. 338, 160 A. 922 (1932)
Sundlun v. Zoning Board of Review of Pawtucket, 50 R. I. 108, 145 A. 451 (1929)

ship provision of the law and resolution, and to consider that it has a mandate to rectify everything which appeals to it as being undesirable. Some go so far as to declare that under this provision the board can practically abolish any regulation included in the building zone resolution or indicated on the map whenever it chooses and substitute in its place its own arbitrary preference. Such critics advocate withholding this power of adjustment from a board of appeals in cases of unnecessary hardship, or even go so far as to assert that such a board is more dangerous than helpful and that a zoning plan is stronger without it. It is true that it is difficult for any group of fair-minded men to refrain from righting a wrong when they see it. On this account it is undoubtedly a temptation to a board of appeals to overstep its lawful function. In the main, however, the Board of Appeals of the City of New York has recognized the limitations placed upon it by the charter and resolution. The few cases where it has erred in this respect are far overbalanced by the vast number of cases where it refused to be drawn outside of its proper field. Legislative power in regard to zoning is given by the charter to the Board of Estimate. The function of the Board of Appeals is that of adjustment and not alteration. It cannot alter the building zone resolution or map. It is sometimes difficult to draw the line between what is an adjustment that the Board of Appeals can make under the rules laid down by the Board of Estimate in cases of unnecessary hardship and an alteration which alone can be made by the Board of Estimate. That Board has prescribed the following rule:

> Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary any such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done.

Before the Board of Appeals can make an adjustment under this provision it must first find that there is a practical difficulty or an unnecessary hardship, and after that find and prescribe an alternative method that is in harmony with the purpose and intent of the building zone resolution. If, for instance, the Board of Estimate has made a certain street block a business district, it is not within

the power of the Board of Appeals to declare that the street is so depressed that it is an unnecessary hardship to prevent a lot owner from building a public garage which is prohibited in such a district. If the locality is so depressed in value as to warrant this statement, the Board of Appeals should refer the applicant to the Board of Estimate so that as the legislative authority of the city it may change the district from business to unrestricted. It is not for the Board of Appeals to endeavor to make this change—which is a piece of legislation—through the form of a nonconforming permit on the ground of unnecessary hardship. Similarly if such a locality is a residence district, it is not for the Board of Appeals to determine that stores have become so numerous that on the ground of unnecessary hardship it will permit another store to be built by the applicant. That action is alteration, not adjustment. If the district has become so given over to business that it is an unnecessary hardship to prevent a man from building a store, then it is for the Board of Estimate to make it a business district; the Board of Appeals should not try to accomplish the same result by exceeding its powers. The provision giving it power to make variances in cases of unnecessary hardship is a salutary one for situations to which it properly applies. These comprise architectural necessities in designing buildings, adaptation of buildings to irregular and unusual lots or environment, completion of architectural units already partly built, and a multitude of adjustments that the human mind cannot foresee or express in words. In general what can be equally well accomplished by a warrantable change in the resolution or map is never within the power of the Board of Appeals but always within that of the Board of Estimate and Apportionment. It must be for the benefit of the community and not for the benefit of the applicant alone.

The courts have had occasion to point out the proper limitation:

But the board contends it had the power to grant this application under section 20 of the zone regulations without regard to any consents. This section provides, ". . . Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary any such provisions in harmony with its general purpose and intent so that the public health, safety and general welfare may be secured and substantial

justice done. . . ." Apparently the board's contention is that this section gives them the power to do whatever they think is right regardless of the provisions of the statute. But it does not grant any such power. The board cannot wholly disregard the provisions of the statute or of the regulations. It can merely "vary" them to do "substantial justice" when the "strict letter" of the provisions would work hardships. The provisions of this section are almost identical with those of subdivision 5 of section 719 of the charter as added by chapter 503 of the Laws of 1916. And under that section it has been held that the board could not disregard the provisions of the statute. *People ex rel. Cockcroft v. Miller*, 187 App. Div. 704. And the zoning resolutions have the force and effect of a statute. *Matter of Stubbe v. Adamson*, 220 N. Y. 459, 465.

Cotton v. Leo, 110 Misc. 519, 180 N. Y. S. 554. This decision was affirmed by the higher court in 194 App. Div. 921, 184 N. Y. S. 943 (1920).

I do not think that this provision for an appeal, with power to reverse any order made, means that the board of appeals has any general power to nullify the provisions of the Labor Law, but rather that its power is limited to cases "where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law," in which case it may vary or modify any provision of "any existing law or ordinance relating to the construction, structural changes in, equipment, alteration or removal of buildings or structures, or vaults and sidewalks appurtenant thereto, so that the spirit of the law shall be observed, public safety secured and substantial justice done."

Cockcroft v. Miller, 187 App. Div. 704, 176 N. Y. S. 206 (1919) See also Altschul v. Ludwig, 216 N. Y. 459, 111 N. E. 216 (1916) and Hyman v. Leo, 108 Misc. 39, 177 N. Y. S. 503 (1919).

When the courts have been appealed to they have been alert to uphold the building zone resolution by preventing the Board of Appeals from exceeding its strictly limited powers. On the other hand, when a special term justice, in a case properly within the domain of that Board, assumed to substitute his own solution of a case for that of the Board and accordingly reversed an order of the latter, the higher court reversed the lower court and upheld the Board, recognizing that within its proper jurisdiction its opinion was based on expert knowledge and that it should not be interfered with by the court except for abuse of discretion.

Applications to vary the zoning regulations in a particular case are addressed largely to the discretion of the board of appeals which

will not be interfered with by the court except in clear cases of abuse of such discretion.

Healy v. Leo, 194 App. Div. 973, 185 N. Y. S. 948 (1920)

The tendency of the court is to support the board of appeals when acting within the scope of its authority:

The board of appeals held a hearing upon the relator's application, and after full discussion denied the application by a vote of four to three. The relator has now obtained a writ of certiorari to review this determination of the board of appeals. This court has been given express power to review the determination of the board of appeals and to reverse or to affirm wholly or partly or to modify the decision brought up for review, and may even take additional evidence upon the hearing. There is, however, a presumption in favor of the correctness of the determination arrived at by the board of appeals, and the court should not interfere with the discretion vested in that body unless that discretion has been arbitrarily exercised or is erroneous in law. The hearings before the board of appeals are not intended merely as the first step in an application to the Supreme Court for a permit, and the Supreme Court should not upon the hearing of a writ of certiorari reverse a determination of the board of appeals, even though the justice presiding might himself have arrived at a different conclusion if the application had been submitted to him in the first instance, and he had a right to exercise his own untrammeled discretion . . . . Each application must be determined upon its own merits, and persons aggrieved by a decision of the board of appeals have a right to appeal from such decision, but such decisions in nowise affect property holders in other sections of the city and in nowise bind the board of appeals when new applications are made for similar relief. It is true that the law presumes that the board of appeals will act reasonably upon all applications brought before it, and so far as possible will arrive at its decisions in all cases by the application of the same rules and methods of reasoning, but each case must stand or fall upon its own peculiar facts, and even though I might believe that in some instances the board of appeals gave greater weight to the interest of the applicant and less weight to the position of other property holders than it has done in this case, that fact would constitute no ground for a reversal of this decision of the board of appeals if upon the facts proven here that decision is not unreasonable as a matter of law. It follows that the writ must be dismissed, with costs.

Ruth v. Leo, Supreme Court, New York County, New York Law Journal, March 29, 1921; affd. 197 App. Div. 942, 188 N. Y. S. 945 (1921)

See also the following cases:

Facey v. Leo, 110 Misc. 516, 180 N. Y. S. 553, affd. 230 N. Y. 602, 130 N. E. 910 (1921)

Flegenheimer v. Leo, Supreme Court, New York County, New York Law Journal, May 8, 1918, affd. 186 App. Div. 893, 172 N. Y. S. 912 (1918)

Helvetia Realty Co. v. Leo, 183 N. Y. S. 37, affd. 231 N. Y. 619, 132 N. E. 912 (1921)

Sondern v. Walsh, 108 Misc. 193, 196, 178 N. Y. S. 192, 194 (1919)

West Side Mortgage Co. v. Leo, 174 N. Y. S. 451 (1919)

Review of Determination of Board of Appeals by the Court

Most state enabling acts for zoning provide a brief statutory certiorari or statutory appeal to court in order to review and readjust, if necessary, the determination of the board of appeals.[1] Prompt application to the court is necessary inasmuch as it may grant a restraining order preventing the beginning of construction.[2] The court may affirm, wholly or partly, or may modify the decision brought up for review.[3] All states have procedure for certiorari or its equivalent called appeal or review.[4] But the statutory certiorari procedure contained in zoning enabling acts is a separate and distinct method. Its purpose is to make the courts part of the avail-

[1] Petition of Forbes, 316 Ill. 141, 146 N. E. 448 (1925)
Some states have not given courts adequate power of review.
Phelps v. Board of Appeals of Chicago, 325 Ill. 625, 156 N. E. 826 (1927)
Luten v. Schmidt, 153 N. E. 481, 88 Ind. A. 134, 163 N. E. 536 (1928)
Mayor and City Council of Baltimore v. Rutherford, 145 Md. 363, 125 A. 725 (1924)
Tighe v. Osborne, 149 Md. 349, 131 A. 801, 150 Md. 452, 133 A. 465 (1926)

[2] *Under the New York requirement a certiorari order must be obtained within thirty days or the application will be denied.*
In re Queens Park Development, Supreme Court, Kings County, N. Y., New York Law Journal, December 28, 1926
Layman v. Persons, 133 Misc. 661, 233 N. Y. S. 217 (1928)
Prescott v. Pierce, 130 Misc. 63, 223 N. Y. S. 609 (1927)

[3] *Where proof of intentional omission of notice of hearing, the applicant may have more than thirty days.*
Pallante v. Board of Standards and Appeals of New York, Supreme Court, Kings County, New York Law Journal, January 2, 1935, 245 App. Div. 729, 281 N. Y. S. 888 (1935)

[4] Ind.—Board of Zoning Appeals of Indianapolis v. Waintrup, 99 Ind. A. 576, 193 N. E. 701 (1935)
Wyo.—In re McInerney, 47 Wyo. 258, 34 P. (2d) 35 (1934)

able machinery for reasonable zoning. An aggrieved neighbor, who may not have attended the hearing before the board of appeals, may be the party who desires court review. In an application for a common-law writ of certiorari such a person would have no standing, for under that procedure the court passes on questions of law only, whereas under the usual zoning provision it passes also on the completeness of the board's exercise of discretion. Some state enabling acts have failed to supply their courts with the amplitude of power that is desirable, and the result is that in such states the courts are virtually limited to the scope of the common-law writ of certiorari.

When Baltimore passed a zoning ordinance—in dependence on its home rule charter and before the passage of a state enabling act—a trial *de novo* by the City Court was provided for instead of a review by court.[1]

Where the determination of the board of appeals is contrary to law, the court will reverse it, in whole or part. Sometimes the building inspector makes a mistake in interpreting the law and the board of appeals makes the same mistake. Here the discretion of the board of appeals is not reviewed by the court, but the mistake of law is set right.[2]

The law and practice in the state of New York and most other states recognize another field of illegality in the review of boards of appeals. This is abuse of discretion, or arbitrariness, by the board in passing on the proposed variance. States have developed varying methods of court review.[3] Some cling to common-law

[1] Greenway Apartment Co. v. Suls, Baltimore (Md.) City Court, Baltimore Daily Record, March 4, 1930, also Baltimore Daily Record, June 5, 1930

[2] Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)
Mass.—Harper v. Board of Appeal of Boston, 271 Mass. 482, 171 N. E. 430 (1930)
N. J.—Dorsey Motors, Inc. v. Davis, 13 N. J. Misc. 620, 180 A. 396 (1935)

[3] Iowa—Zimmerman v. O'Meara, 215 Iowa 1140, 245 N. W. 715 (1932)
Mich.—Beardsley v. Evangelical Lutheran Bethlehem Church, 261 Mich. 458, 246 N. W. 180 (1933)
N. J.—Gadek v. Kugler, 6 N. J. Misc. 471, 141 A. 561 (1928)
Gallo v. Moffett, 8 N. J. Misc. 39, 148 A. 153 (1930)
Goldberg v. Mayor and Aldermen of Jersey City, 6 N. J. Misc. 564, 142 A. 355 (1928)
Peshine Realty Co. v. Scott, 4 N. J. Misc. 977, 135 A. 80 (1926)
N. Y.—New York Cent. R. Co. v. Leo, 105 Misc. 372, 173 N. Y. S. 217 (1918)

Footnote continued on page 155.

certiorari and frown on the short statutory certiorari usually provided for in zoning enabling acts. Massachusetts regards all certiorari as a review of legality rather than a review of fair discretion.[1]

In a sense arbitrariness or abuse of discretion is a matter of law, but there is a plain difference between rectifying a mistake in interpretation of the law, and rectifying an abuse of discretion. Such abuse by a board of appeals does not always mean a deliberate act of wrongdoing. Indeed the fair line in the exercise of discretion is difficult, and in most cases what the courts call an abuse of discretion implies no wrongdoing whatever. A board of appeals in Boston might honestly say that a twenty-story building in a ten-story district was a fair variance and the court would uphold it in reviewing a matter of law.[2] In New York the court might call such a variance an abuse of discretion. It is helpful to recognize two fields of court review—one for rectifying mistakes of law and another for preventing abuses of discretion. The usual grounds for reversing or modifying the determinations of boards of appeals are arbitrariness and abuse of discretion.[3] Court costs have been granted against boards of appeals in a few instances.[4]

Footnote continued from page 154.

Shary v. Board of Standards and Appeals, Supreme Court, Bronx County, New York Law Journal, May 20, 1933
Stern v. Mason, Supreme Court, Nassau County, New York Law Journal, July 2, 1930
N. D.—Livingston v. Peterson, 59 N. D. 104, 228 N. W. 816 (1930)
Wis.—Wasserman v. Cooper, 201 Wis. 359, 230 N. W. 50 (1930)

[1] Mass.—Bradley v. Board of Zoning Adjustment of Boston, 255 Mass. 160, 150 N. E. 892 (1926)
Godfrey v. Building Commissioner of Boston, 263 Mass. 589, 161 N. E. 819 (1928)
Hammond v. Board of Appeal of Springfield, 257 Mass. 446, 154 N. E. 82 (1926)
Marcus v. Commissioner of Public Safety, 255 Mass. 5, 150 N. E. 903 (1926)
Marinelli v. Board of Appeal of Boston, 275 Mass. 169, 175 N. E. 479 (1931)
Norcross v. Board of Appeal of Boston, 255 Mass. 177, 150 N. E. 887 (1926)
Prusik v. Board of Appeal of Boston, 262 Mass. 451, 160 N. E. 312 (1928)

[2] Norcross v. Board of Appeal of Boston, 255 Mass. 177, 150 N. E. 887 (1926)

[3] Conn.—Appeal of Holley, 110 Conn. 80, 147 A. 300 (1929)
Thayer v. Board of Appeals of Hartford, 114 Conn. 15, 157 A. 273 (1931)
Neb.—Coulthard v. Board of Adjustment of Neligh, 265 N. W. 530 (1936)
N. Y.—Anderson v. Board of Standards & Appeals, Supreme Court, New York County, New York Law Journal, June 22, 1928

Footnote No. 3 continued on page 156.

[4] N. Y.—Cotton v. Leo, 110 Misc. 519, 180 N. Y. S. 554, 194 App. Div. 921, 184 N. Y. S. 943 (1920)
Levy Brothers Realty Co. v. Walsh, 257 N. Y. 543, 178 N. E. 787 (1931)

It has been held that a refusal of proof by a board of appeals is an abuse of discretion.[1]

A stay may be granted by court against a board of appeals to prevent the consummation of an improper variance.[2]

Enabling acts usually provide that an appeal to the board of appeals stays all proceedings. Many persons have inferred that this prevents construction while the appeal is pending. It has been held, however, that the provision as to stay refers only to legal proceedings.[3] The proceedings of a board of appeals are not of that nature.

The board of appeals is not injured by a reversal of its determination and therefore cannot itself appeal.[4]

Courts avoid substituting their discretion for that of boards of appeals. They declare that the function of the board is to exercise

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Footnote No. 3 continued from page 155.

Bator Realty Corp. v. Walsh, Supreme Court, Bronx County, New York Law Journal, December 17, 1929, affd. 229 App. Div. 850, 243 N. Y. S. 807 (1930)
Bee Dee Realty Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, January 14, 1930
Biltmore Holding Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, July 5, 1929
Block Holding Corp. v. Warshaw, 237 App. Div. 839, 261 N. Y. S. 914 (1932)
Chisholm Realty Co. v. Walsh, Supreme Court, New York County, New York Law Journal, June 2, 1922
Church & 94th St. Realty Corp. v. Murdock, Supreme Court, Kings County, New York Law Journal, May 2, 1933, and September 16, 1933
Essanarr Garage Corp. v. Board of Standards and Appeals, Supreme Court, Kings County, New York Law Journal, March 11, 1932, affd. 237 App. Div. 857, 261 N. Y. S. 937 (1932)
Hyman v. Walsh, Supreme Court, Kings County, New York Law Journal, October 6, 1927
Matter of Ruth Bond & Mortgage Co., Supreme Court, Kings County, New York Law Journal, May 2, 1933
Nash v. Board of Appeals of North Hempstead, Supreme Court, Nassau County, New York Law Journal, March 29, 1930
Rindfleisch v. Bayly, Supreme Court, Westchester County, Westchester Law Journal, August 9, 1933, 242 App. Div. 797, 275 N. Y. S. 657 (1934)
Sabbarese v. Walsh, Supreme Court, Kings County, New York Law Journal, March 6, 1926
R. I.—Drabble v. Zoning Board of Review of Providence, 52 R. I. 228, 159 A. 828 (1932)

[1] Rosoff v. Walsh, 230 App. Div. 789, 244 N. Y. S. 920 (1930)

[2] 25 Fifth Ave. Corp. v. Board of Standards and Appeals, Supreme Court, New York County, N. Y., New York Law Journal, August 1, 1929

[3] Clemons Realty Co. v. Brady, Supreme Court, New York County, N. Y., New York Law Journal, August 30, 1927

[4] Appeal of Board of Adjustment, Lansdowne Borough, 313 Pa. 523, 170 A. 867 (1934)

the discretion of experts, and that the court—although it might not arrive at the same result—will refuse to alter a determination wherein the board has complied with all legal requirements of notice and hearing and has exercised fair discretion.[1]

[1] Ill.—Minkus v. Pond, 326 Ill. 467, 158 N. E. 121 (1927)
N. J.—Harrison v. Board of Adjustment of Montclair, 6 N. J. Misc. 570, 142 A. 353 (1928)
N. Y.—A. P. M. Holding Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, January 19, 1931
Apollo Bldg. Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, August 9, 1926
Barker v. Boettger, 124 Misc. 461, 208 N. Y. S. 295 (1924)
Batches v. Connell, Supreme Court, Kings County, New York Law Journal, November 21, 1932
Beardsley Realty Co. v. Walsh, 225 App. Div. 815, 232 N. Y. S. 693, affd. 252 N. Y. 571, 170 N. E. 147 (1929)
Bolmar v. Walsh, Supreme Court, Bronx County, New York Law Journal, August 1, 1929
Cirrito v. Board of Standards and Appeals of New York, 245 App. Div. 762, 280 N. Y. S. 606, affd. 270 N. Y. 499, 200 N. E. 289 (1936)
Dinerman v. Walsh, Supreme Court, Kings County, New York Law Journal, April 27, 1925
Dyer v. Walsh, Supreme Court, Bronx County, New York Law Journal, July 9, 1930
Finger v. Connell, Supreme Court, Bronx County, New York Law Journal, February 19, 1932, and May 27, 1932
Handel v. Walsh, 227 App. Div. 738, 236 N. Y. S. 811 (1929)
Ideal Roof & Skylight Works v. Walsh, Supreme Court, Bronx County, New York Law Journal, March 12, 1929, affd. 227 App. Div. 777, 237 N. Y. S. 801 (1929)
In re Pane, Supreme Court, Kings County, New York Law Journal, December 20, 1928
Keizerstein v. Walsh, Supreme Court, Queens County, New York Law Journal, May 5, 1928, affd. 225 App. Div. 805, 232 N. Y. S. 784 (1929)
Lee v. Walsh, Supreme Court, Kings County, New York Law Journal, June 28, 1929
Lowlou Corporation v. Walsh, Supreme Court, Kings County, New York Law Journal, July 14, 1926
Maslon v. Walsh, Supreme Court, Kings County, New York Law Journal, December 1, 1924
Matter of Newford Realty Co., Inc., Supreme Court, Kings County, New York Law Journal, March 31, 1933
N. & H. Bldg. Co. v. Walsh, Supreme Court, Kings County, New York Law Journal, April 8, 1926, affd. 223 App. Div. 844, 228 N. Y. S. 859 (1928)
Parker v. Hardgrove, Supreme Court, Nassau County, New York Law Journal, July 16, 1927
Regina Boulevard Corp. v. Murdock, Supreme Court, Kings County, New York Law Journal, October 23, 1935
Richardson v. Knapp, 227 App. Div. 207, 237 N. Y. S. 589 (1929)
Roehrs v. Walsh, Supreme Court, Bronx County, New York Law Journal, June 3, 1925
Ruth v. Leo, Supreme Court, New York County, New York Law Journal, March 29, 1921, affd. 197 App. Div. 942, 188 N. Y. S. 945 (1921)

Footnote continued on page 158.

Where there is no board of appeals there can be no certiorari.[1] In such a situation the powers of the courts cannot be used for constructive adjustment but must be used to uphold or annihilate the particular zoning regulation.

The statutory provision for certiorari usually contained in enabling acts is to the effect that the court, by taking evidence or appointing a referee, may fill in gaps in the return of the board of appeals. This procedure was designed to allow the decision of the court to be complete, and to avoid sending the application back to be heard again by the board of appeals. Such additional taking of evidence was not intended to be a trial *de novo*.[2] This provision has been frequently used.[3]

Footnote continued from page 157.

Sanfer Realty Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, July 13, 1926

Schneider v. Walsh, Supreme Court, Kings County, New York Law Journal, July 25, 1925

Schrage v. Walsh, Supreme Court, Queens County, New York Law Journal, March 8, 1928

Socora Realty & Const. Co. v. Walsh, Supreme Court, Bronx County, New York Law Journal, February 3, 1926

Third Ave. R. R. v. Walsh, Supreme Court, New York County, New York Law Journal, April 7, 1926, affd. 220 App. Div. 760, 222 N. Y. S. 910 (1927)

257 Madison Ave. v. Board of Appeals, Supreme Court, New York County, New York Law Journal, April 16, 1926

Van Iderstine v. Walsh, Supreme Court, Kings County, New York Law Journal, June 6, 1922, affd. 208 App. Div. 740, 202 N. Y. S. 946 (1924)

Wilkins v. Walsh, Supreme Court, Kings County, New York Law Journal, December 21, 1927, 225 App. Div. 774, 232 N. Y. S. 918, 251 N. Y. 518, 168 N. E. 411 (1929)

R. I.—Heffernan v. Zoning Board of Review of Cranston, 49 R. I. 283, 142 A. 479 (1928), 50 R. I. 26, 144 A. 674 (1929)

[1] Carter v. Rosenthal, 179 Wis. 243, 191 N. W. 562 (1923)

[2] N. Y.—Raskin v. Murdock, 243 App. Div. 561, 276 N. Y. S. 168 (1934)
Rubel Corp. v. Murdock, 245 App. Div. 821, 282 N. Y. S. 126, Supreme Court, Kings County, New York Law Journal, August 1, 1936

[3] Ill.—Hughes v. Board of Appeals of Chicago, 325 Ill. 109, 156 N. E. 350 (1927)
Ind.—O'Connor v. Overall Laundry, 98 Ind. A. 29, 183 N. E. 134 (1932)
Iowa—Anderson v. Jester, 206 Iowa 452, 221 N. W. 354 (1928)
N. Y.—Ade Realty Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, June 4, 1929
Arseekay Syndicate v. Board of Standards and Appeals, Supreme Court, Queens County, New York Law Journal, October 25, 1932, 241 App. Div. 755, 270 N. Y. S. 232, 265 N. Y. 158, 191 N. E. 871 (1934)
Bass v. Walsh, Supreme Court, Kings County, New York Law Journal, July 24, 1925
Black Belt Corp. v. Hall, Supreme Court, Chautauqua County, Jamestown Evening Journal, November 18, 1922

Footnote continued on page 159.

Harris H. Murdock, Chairman of the Board of Standards and Appeals of New York City, urges that courts instead of taking additional evidence should refer the matter back to the Board with directions. He points out that courts often retry the case, and because they do not know the needs of the locality they fail to protect the neighborhood or carry out the purposes of the ordinance. Mr. Murdock is undoubtedly correct in his criticism. The direction from the court to the board should be to amend its return and take additional evidence if necessary. In a few cases the court has asked the board to take further evidence. The usual mistake is that counsel lead courts into a retrial of the case, forgetting that the court should do no more than review the determination of the board and merely fill in by new evidence such facts as are necessary or desirable to assist it to form a just conclusion. Submission to

Footnote continued from page 158.

Caponi v. Walsh, 228 App. Div. 86, 238 N. Y. S. 438 (1930)
De Falco v. Walsh, Supreme Court, Kings County, New York Law Journal, June 24, 1930
Dunne v. Walsh, 235 App. Div. 72, 256 N. Y. S. 119 (1932)
Eckels v. Murdock, Supreme Court, Kings County, New York Law Journal, September 6, 1933, 242 App. Div. 690, 273 N. Y. S. 401, 265 N. Y. 545, 193 N. E. 313 (1934)
Gilmont Corp. v. Rogers, Supreme Court, Westchester County, New York Law Journal, March 6, 1935, and June 8, 1935
In re Seiferling, Supreme Court, Nassau County, New York Law Journal, December 20, 1928
LaVine v. Walsh, 214 App. Div. 805, 210 N. Y. S. 906 (1925)
MacDonald v. Walsh, Supreme Court, Kings County, New York Law Journal, January 13, 1925
Mazzarell v. Walsh, 231 App. Div. 748, 753, 247 N. Y. S. 855 (1930)
Namro Realty Co. v. Walsh, Supreme Court, Kings County, New York Law Journal, April 11, 1928
New York and Richmond Gas Company v. Board of Standards & Appeals, Supreme Court, Kings County, New York Law Journal, May 9, 1932, 242 App. Div. 691, 272 N. Y. S. 915 (1934)
People v. Snedeker, Supreme Court, Nassau County, New York Law Journal, December 1, 1932
Roseth Realty Co. v. Walsh, Supreme Court, Kings County, New York Law Journal, November 23, 1928
Scoland Bldg. Corp. v. Board of Standards & Appeals, Supreme Court, Kings County, New York Law Journal, January 27, 1934
Sifferlen v. Connell, Supreme Court, Kings County, New York Law Journal, February 3, 1931
Squillacci & Torre, Inc. v. Walsh, 221 App. Div. 877, 224 N. Y. S. 920 (1927)
Taylor v. Walsh, Supreme Court, New York County, New York Law Journal, March 11, 1925
Toback, Inc. v. Walsh, Supreme Court, Kings County, New York Law Journal, December 20, 1928, affd. 230 App. Div. 764, 243 N. Y. S. 894 (1930)
R. I.—Harrison v. Hopkins, 48 R. I. 42, 135 A. 154 (1926)

a referee to report facts and conclusions, under the guise of taking additional evidence, was not the intention of the early laws on this subject.[1]

Exhausting the Remedy Given by Law

In the earlier years of comprehensive zoning it was considered that the only method of testing the reasonableness of a zoning regulation in its bearing on a particular plot of land was through the board of appeals. The rule of law was invoked that an owner should first exhaust the remedy given him by law before attacking the constitutionality of the ordinance. If the board of appeals denied him relief, he was considered to be bound to continue the remedy given him by law by asking for the statutory court review. Courts gradually analyzed the situation and began to recognize that where the plaintiff in injunction or mandamus proceedings alleged unconstitutionality he should have his trial without first applying to the board of appeals.[2] It will be unsafe, however, for

[1] N. Y.—Bribitzer v. Bevan, Supreme Court, Westchester County, New York Law Journal, December 2, 1935
Eckels v. Murdock, Supreme Court, Kings County, New York Law Journal, September 6, 1933, 242 App. Div. 690, 273 N. Y. S. 401, 265 N. Y. 545, 193 N. E. 313 (1934)
Emigrant Industrial Savings Bank v. Board of Standards and Appeals, 248 App. Div. 155 (1936)
Hansen & Metzger, Inc. v. Connell, 243 App. Div. 795, 278 N. Y. S. 719 (1935)
Hassall v. Murdock, 246 App. Div. 845, 285 N. Y. S. 54 (1936)
No. 202 West 63d St. Corp'n v. Board of Standards and Appeals of New York, Supreme Court, Kings County, New York Law Journal, April 30, 1935

[2] D. C.—Connor v. District of Columbia, 61 App. D. C. 288, 61 F. (2d) 1015 (1932)
Ill.—Cann v. Chicago, 241 Ill. A. 21 (1926)
Park Ridge Fuel & Material Co. v. Park Ridge, 335 Ill. 509, 167 N. E. 119 (1929)
Md.—Applestein v. Baltimore, 156 Md. 40, 143 A. 666 (1928)
Mass.—Godfrey v. Building Commissioner of Boston, 263 Mass. 589, 161 N. E. 819 (1928)
Knowlton v. Inhabitants of Swampscott, 280 Mass. 69, 181 N. E. 849 (1932)
N. J.—Bilt-Wel Co. v. Dowling, 5 N. J. Misc. 180, 135 A. 798 (1927)
Conaway v. Atlantic City, 107 N. J. L. 404, 154 A. 6 (1931)
Decker v. Moffett, 6 N. J. Misc. 510, 141 A. 784 (1928)
Eaton v. Newark, 3 N. J. Misc. 363, 128 A. 377 (1925)
Elkay Realty Co. v. Redfern, 5 N. J. Misc. 717, 138 A. 196 (1927)
Lutz v. Kaltenbach, 101 N. J. L. 316, 128 A. 421, 3 N. J. Misc. 658, 129 A. 926, 102 N. J. L. 718, 131 A. 899 (1926)
Marlyn Realty Co. v. West Orange, 5 N. J. Misc. 342, 136 A. 926 (1927)
Raskind v. Dowling, 5 N. J. Misc. 715, 138 A. 103 (1927)

Footnote continued on page 161.

the usual plaintiff to assume that he can omit such application and obtain more complete relief by direct attack on the constitutionality of the regulation as it affects his parcel of land.[1] The court in such an attack can do no more than to uphold the regulation or set it aside. It cannot make a variance. Moreover, if there is a substantial relation between the regulation and the health, safety, and general welfare of the community, the court will not substitute its discretion for the discretion of the local legislature which adopted the ordinance. The court will declare that it has a duty

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Footnote continued from page 160.

N. Y.—Broadway & 96th St. Realty Co. v. Walsh, 203 App. Div. 468, 196 N. Y. S. 672 (1922)
Butler v. Bannister & Schell, Inc., Supreme Court, New York County, New York Law Journal, February 14, 1929, affd. 226 App. Div. 789, 234 N. Y. S. 757 (1929)
Cantoni v. Moore, 179 App. Div. 121, 165 N. Y. S. 840 (1917)
Caponi v. Proc Bldg. Corp., Supreme Court, Kings County, New York Law Journal, May 15, 1929
Headley v. Fennell, 124 Misc. 886, 210 N. Y. S. 102, affd. 214 App. Div. 810, 210 N. Y. S. 861 (1924)
Hocker v. Howell, Supreme Court, Suffolk County, New York Law Journal, February 18, 1930
Horwitz v. Schwab, 130 Misc. 158, 223 N. Y. S. 638, 130 Misc. 448, 224 N. Y. S. 41 (1927)
Linden Estates Corp. v. Flanagan, Supreme Court, Kings County, New York Law Journal, April 5, 1929
Lutz v. Courtney, Supreme Court, Nassau County, New York Law Journal, November 16, 1927
Matter of Heepe, Supreme Court, Kings County, New York Law Journal, March 14, 1924
McNulty & Carson, Inc. v. Murphy, Supreme Court, Westchester County, May 22, 1929
Owid v. Moushaty, 125 Misc. 535, 211 N. Y. S. 478 (1925)
Plummer v. McDermott, Supreme Court, Kings County, New York Law Journal, June 11, 1929
Rosiello v. Kleinert, Supreme Court, Kings County, New York Law Journal, May 8, 1923
Tishman v. 1400 Broadway Corp., Supreme Court, New York County, New York Law Journal, January 28, 1931
West v. Walsh, Supreme Court, Bronx County, New York Law Journal, August 30, 1926, affd. 220 App. Div. 751, 222 N. Y. S. 920 (1927)
Westchester Asphalt Distributing Corp. v. Wyand, 234 App. Div. 881, 254 N. Y. S. 935 (1931)
Wulfsohn v. Burden, Supreme Court, Westchester County, Mt. Vernon Daily Argus, May 26, 1926
N. C.—Harden v. City of Raleigh, 192 N. C. 395, 135 S. E. 151 (1926)
State v. Roberson, 198 N. C. 70, 150 S. E. 674 (1929)
Pa.—Taylor v. Moore, 303 Pa. 469, 154 A. 799 (1931)
Texas Co. v. City of Bethlehem, Court of Common Pleas, Northampton County, April 4, 1927

[1] Rosenbush v. Keller, 271 N. Y. 282, 2 N. E. (2d) 659 (1936)

to uphold the enactment, however it may feel about the wisdom of it. Then, too, if the court annihilates the zoning of the plaintiff's land, there is nothing to prevent the local legislature from rezoning it at once in a different way which may be equally disturbing to the landowner. Where the owner desires to obtain a permit it will usually be better for him to prepare his plans and specifications and ask for a variance. Such a case, however, is not based on unconstitutionality but on practical difficulty and unnecessary hardship or on some grounds of variance provided in the ordinance itself. The owner cannot ordinarily carry his case to the United States Supreme Court because if it is based on practical difficulty it does not raise a question under the United States constitution.

Since the beginning of zoning there has been a gradually growing tendency of courts to recognize that in the generality of cases there is a substantial relation between the regulation and the community health, safety, and general welfare, and to require the applicant to go first to the board of appeals only when his situation is exceptional. The mere plea of unconstitutionality will not justify his omitting such application. Sometimes the regulation is unlawful on its face, like the requirement of a greater height than one story.[1] In such a case he can always omit applying to the board of appeals, plead unconstitutionality, and bring his case directly before the court by injunction or mandamus. The court opinions in the different states, or even within New York state, are not entirely harmonious.[2] This is not strange considering the novelty of the subject.

[1] Ill.—Brown v. Board of Appeals of Springfield, 327 Ill. 644, 159 N. E. 225 (1927)
N. J.—Dorison v. Saul, 98 N. J. L. 112, 118 A. 691 (1922)
Romar Realty Co. v. Board of Com'rs of Haddonfield, 96 N. J. L. 117, 114 A. 248 (1921)
N. Y.—Oppenheimer v. Kraus, 221 App. Div. 773, 223 N. Y. S. 467, affd. 246 N. Y. 559, 159 N. E. 651 (1927)

[2] Ill.—Ehrlich v. Village of Wilmette, 361 Ill. 213, 197 N. E. 567 (1935)
Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930)
N. J.—Builders' Realty Corp. v. Bigelow, 102 N. J. L. 433, 131 A. 888 (1926)
N. Y.—Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931)
Isbister v. Isbister, Supreme Court, Westchester County, May 8, 1925, 215 App. Div. 838, 213 N. Y. S. 826 (1926)
Isenbarth v. Bartnett, 206 App. Div. 546, 201 N. Y. S. 383, affd. 237 N. Y. 617, 143 N. E. 765 (1924)
Keiser v. Village of Mineola, Supreme Court, Nassau County, New York Law Journal, March 9, 1933

Footnote continued on page 163.

In course of the argument of Dowsey v. Village of Kensington before the Court of Appeals, New York, Chief Judge Cardozo asked whether the regulation affected in a similar manner all parcels of land on the main thoroughfare and intimated that if it did there was no duty on the plaintiff to resort to the board of appeals, but on the contrary that it was the duty of the local legislature to change the zoning map if the existing zoning was unreasonable. His point evidently was that before the village could insist that the plaintiff should exhaust the remedy given him by law the village should show that the situation of the plaintiff's parcel was unique and different from other parcels. The opinion in this case, written by Lehman, Associate Judge, does not refer to this point. If the rule that the plaintiff must exhaust the remedy given him by law applies only to the owner of an exceptional or unique parcel of land, it throws light on another difficult question—when should a municipality change the zoning map and when may it depend on the power of the board of appeals to make variances.

This subject is further discussed under Injunction at page 172.

Statutory Abbreviation of Proper Functions of Boards of Appeals

The proper functions of boards of appeals are to make variances in cases of practical difficulty and unnecessary hardship, as provided by the state enabling act, to make variances in proper cases under items of original jurisdiction contained in the ordinance, and to review the legality of determinations made by building inspectors. Some state legislatures have feared that boards of appeals will abuse their proper functions, and have tried to limit these functions by statute. As a rule such efforts bring about more litigation than they prevent, and the results are less satisfactory than if the board is given adequate power. In New Jersey the zoning enabling act provides that the board of adjustment can make variances only within one hundred and fifty feet of a district bound-

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Footnote continued from page 162.

Maloff v. Kimmey, Supreme Court, Onondaga County, April 2, 1931
Municipal Gas Co. of Albany v. Nolan, 121 Misc. 606, 201 N. Y. S. 582, 208 App. Div. 753, 202 N. Y. S. 939 (1924)
Willerup v. Village of Hempstead, 120 Misc. 485, 199 N. Y. S. 56 (1923)

ary line.[1] Outside this territory it can make recommendations to the local legislative body which the latter is expected to approve and thus perfect the variance permit. The reason for this strange arrangement seems to be that the legislature had an impression that variances should be prevented so far as possible, but that those applied for near boundary lines were more likely to be justifiable. This arrangement has thrown the entire subject into confusion in New Jersey. Two separate boards, one discretionary and the other legislative, are compelled to pass on most applications of this type. A variance made by the board of adjustment is readily reviewed by the court in certiorari as a discretionary act. Legislative acts are not so readily reviewed. The question at once arises whether in New Jersey the act of the local legislative body in making a variance is discretionary or legislative. If it is legislative, it cannot be reviewed by certiorari. Thus far the New Jersey courts have been inclined to consider it discretionary and therefore subject to court review by certiorari. Nothing is gained by this circuitous and puzzling procedure. A New Jersey board of adjustment is presumed to be a body of experts, yet its recommendations have to be reviewed by the local legislative body, which is not presumed to have that character.

By an amendment of doubtful wisdom in the Town Law of New York,[2] the applicant or other party was given the right to appeal to the town board from every determination of the board of appeals. This amendment was severely criticized in its operation and was shortly repealed.

Advising the Local Legislature

Sometimes a street or block ought to be transferred by the local legislature from one district on the zoning map to another. Instead of bringing such a matter to the attention of the local legislature boards of appeals sometimes make a series of variance

[1] N. J.—Essex Inv. Co. v. Board of Com'rs of Newark, 183 A. 478 (1936)
Fonda v. O'Donohue, 109 N. J. L. 584, 163 A. 2 (1932)
Gabrielson v. Borough of Glen Ridge, 13 N. J. Misc. 142, 176 A. 676 (1935)
Pennington Courts, Inc. v. Board of Adjustment of Passaic, 7 N. J. Misc. 1037, 147 A. 732 (1929)
Schumacher v. Union City, 9 N. J. Misc. 492, 154 A. 406 (1931)

[2] Matter of Meadowmere Ass'n, Inc., Supreme Court, Nassau County, N. Y., New York Law Journal, August 17, 1932

permits. For instance, near the boundary line between business and residence districts, where there are already stores in the business district, a variance permit may perhaps justifiably be issued for a store on the edge of the residence district. Soon another such permit will be issued, and before long a third. By this time the trend has shown itself so clearly that it is not proper to grant variance permits; the board of appeals ought to make a report to the local legislature advising it to change the map. No one knows so well what ought to be done as the board of appeals.[1] Its members have viewed the premises and have heard testimony regarding the altered situation. Landowners often delay in applying to the local legislature to make the needed map change because they desire to obtain the small advantage that comes from exclusive variance permits. In permitting successive variances a community is not following the rule that land situated alike should be zoned alike.

General Conclusions Applicable to all States and Cities

The main difficulty in establishing a zoning plan is to make it effective and at the same time avoid arbitrariness. Human wisdom cannot foresee the exceptional cases that can arise in the administration of a zoning ordinance. The strict letter of the law may sometimes be the height of injustice. No zoning ordinance standing by itself can provide for the proper adaptation of the spirit of the law to each exceptional case. On this account, in the administration of building laws in general and especially zoning ordinances, it has been found desirable to create a board of appeals in order to adapt the application of the law to particular exceptional instances, instead of allowing it to be arbitrary or confiscatory. A city cannot create such a body without authority from the state legislature to do so. Therefore any state enabling act for zoning should contain a provision empowering the city to appoint a board of this type and outlining its functions. Merely to provide that a city can appoint the specified board to do what is just or lawful is not enough; such a statement in the law gives the board no power whatever. The state enabling act must either prescribe the rules

[1] Coleman v. Board of Appeal of Boston, 281 Mass. 112, 183 N. E. 166 (1932)

that the board must follow, or empower the city council to assign to it for decision certain specified classes of exceptional cases. The council should also prescribe a rule to be followed in deciding each class of cases. The New York board, as already pointed out, is given three distinct functions: first, to rectify errors made by the building inspector in granting or refusing permits; secondly, to pass on exceptional cases where specified in the ordinance itself, and third, to vary the literal requirement of the law where practical difficulty or unnecessary hardship is caused, and the intention of the law is equally accomplished by an alternative method to be prescribed by the board.

Inasmuch as exceptional situations come only before a board of appeals there is always a presumption that the applicant, like all other citizens, should observe the strict letter of the zoning ordinance. Therefore, if an exception is to be made the vote of the board should be greater than a mere majority. In other words, an applicant desiring an exception should be able to convince a large proportion of the board. State enabling acts for zoning usually provide for this. On the other hand, it should be possible for a mere majority to refuse to make an exception so that there may be a decision of denial on which the applicant can ask for a court review.

States and cities will not go far afield when they come to define the functions of the council and the board of appeals if they will remember that the council is the city legislature and as such has entire control over the zoning ordinance and map. The board of appeals should have no such control, but should pass on specific permits arising under the provisions of the ordinance and map. Thus the council and the board of appeals have separate fields which do not overlap. The council does not adjudicate in relation to a particular building or its use. The board of appeals passes on nothing but particular buildings. The council impresses a certain legal status on the land itself. The board of appeals in certain exceptional cases varies the application of the ordinance for a building or use which temporarily occupies the land, but cannot change the status of the land.

Complaints will always be made against boards of appeals, and probably such boards will always abuse their discretion once in a while. If, however, a city administration is not able to establish

a competent board of appeals, it probably is not able to administer a zoning ordinance fairly. An occasional wrong decision by such a board is of less importance to the community than the unrelieved arbitrariness of an iron-clad ordinance which first in one particular application and then in another may be criticized by the courts. A board of appeals should be able to ameliorate the exceptional instances wherein alone lies the danger to the entire zoning plan. These cases demand the most careful attention, for the integrity of a zoning plan under the police power, as the courts have repeatedly pointed out, depends on its reasonableness, and a zoning regulation is not reasonable if it is arbitrary.

There would seem to be no difficulty in finding the meaning of the phrase "practical difficulties or unnecessary hardships" (already discussed, p. 142) as a rule of conduct for the guidance of boards of appeals. An instructive, clear-cut opinion, which is cited frequently in states having boards of appeals, is that rendered by Justice Cardozo when he was chief judge of the Court of Appeals of New York in the case of Fordham M. R. Church v. Walsh, 244 N. Y. 280, 155 N. E. 575 (1927). A permit was sought for a public garage on Aqueduct Avenue near Fordham Manor Reformed Church, on a site in the Borough of The Bronx, which was partly in a residence district and partly in a business district. This much-used street, proceeding north and south, the owner claimed was unique in its desirability for a public garage. He urged that no other use could be made of the plot that was equally profitable or suitable. On the ground of practical difficulties and unnecessary hardships he based his request for a variance permit from the Board of Standards and Appeals. The opinion referred to made it clear that the words "practical difficulties and unnecessary hardships" have a wider significance than to denote the use of a given plot that will be the most profitable. The environment must be taken into account. Structures suitable to the environment can be required even if they do not always give the most profitable use for the plot. Many other decisions interpret these words in harmony with the Fordham Church case.[1]

[1] Ind.—Dollman v. Osbon, Marion Circuit Court, Indianapolis, May 3, 1928
N. Y.—Bronner v. Walsh, Supreme Court, Kings County, New York Law Journal, June 26, 1928, affd. 225 App. Div. 759, 232 N. Y. S. 704 (1928)

Footnote continued on page 168.

Harris H. Murdock, Chairman of the Board of Standards and Appeals of New York City, has defined the word "hardship." He adds his experience as an architect to his accurate observation of court comments on several hundred cases that have passed under his scrutiny. He writes:

The question has been asked, "What is hardship?" The Court has said that an owner is entitled to a reasonable use of his land. What may or may not be reasonable cannot be stated in any general rule. It does not mean that one owner is entitled to a special privilege by a variation that is denied others similarly situated or that will cause hardship to other owners. It doesn't mean that in times of depression an owner is entitled to a zoning variance because due to the depression his property does not carry itself. It doesn't mean that a variation can be justified because a non-conforming use will provide a greater return than a conforming use.

Footnote continued from page 167.

Darraugh v. Walsh, Supreme Court, Kings County, New York Law Journal, April 2, 1929, affd. 228 App. Div. 703, 238 N. Y. S. 818 (1930)
Delpad Realty Corp. v. Connell, Supreme Court, Bronx County, New York Law Journal, June 27, 1931
Dunne v. Walsh, 235 App. Div. 72, 256 N. Y. S. 119 (1932)
Falvo v. Kerner, 222 App. Div. 289, 225 N. Y. S. 747 (1927)
Fordhof Realty Co. v. Murdock, Supreme Court, Bronx County, New York Law Journal, April 10, 1936
Garden Properties, Inc. v. Board of Appeals of New Rochelle, Supreme Court, Westchester County, Westchester Law Journal, October 11, 1933
Gilmont Corp. v. Rogers, Supreme Court, Westchester County, New York Law Journal, June 8, 1935
Hoberman v. Walsh, Supreme Court, Kings County, New York Law Journal, May 14, 1929
Home for Hebrew Infants v. Hand R. Corp., 131 Misc. 581, 227 N. Y. S. 570 (1928)
Howard Funding Co. v. Walsh, Supreme Court, Bronx County, New York Law Journal, November 1, 1930
Levy v. Board of Standards and Appeals, Supreme Court, Kings County, New York Law Journal, April 12, 1934, 243 App. Div. 609, 276 N. Y. S. 370, 267 N. Y. 347, 196 N. E. 284 (1935)
Proc Bldg. Corp. v. Connell, 240 App. Div. 782, 266 N. Y. S. 903, affd. 264 N. Y. 513, 191 N. E. 541 (1934)
Revorg Realty Co. v. Walsh, 225 App. Div. 774, 232 N. Y. S. 141, affd. 251 N. Y. 516, 168 N. E. 410 (1929)
Stillman v. Board of Standards & Appeals, 222 App. Div. 19, 225 N. Y. S. 402, affd. 247 N. Y. 599, 161 N. E. 197 (1928)
Strochak v. Walsh, Supreme Court, Queens County, New York Law Journal, May 6, 1930
Werner v. Walsh, 212 App. Div. 635, 209 N. Y. S. 454, affd. 240 N. Y. 689, 148 N. E. 760 (1925)
Young Women's Hebrew Association v. Board of Standards and Appeals, 266 N. Y. 270, 194 N. E. 751, 296 U. S. 537, 56 S. Ct. 109 (1935)

It doesn't mean that if the district appears to be incorrectly zoned that the owner *ipso facto* is entitled to a variation. The best answer to the question is that unnecessary hardship is all the elements which taken together indicate that the property under appeal is unique and cannot be put to a conforming use that will provide a reasonable return under normal conditions. If this is the situation, the Board must put the application to the other tests to assure itself that, if granted, others will not be unduly injured and that public health, safety and general welfare will be secured and substantial justice done.

In New York City there was much discussion in 1932 and 1933 as to the power of the Board of Appeals in relation to temporary gasoline stations—whether the Board, under the provision for variances in cases of practical difficulties and unnecessary hardships, could issue permits for five years. The ordinance allowed the Board to make certain temporary permits for not more than two years, as special exceptions. Although gasoline stations were not specified in this provision of the ordinance, it had become customary to grant two-year permits for them in proper cases. The chairman of the Board was strongly in favor of a better type of station and considered that a five-year permit would stimulate such structures.[1] It accordingly became the practice to issue five-year permits in proper cases. If this is lawful under the provision of practical difficulties and unnecessary hardships, it is also lawful for boards of appeals to place a time limit as a condition on any variance permit. There would seem to be no reason why that practice is not lawful.

Where the state enabling act provides that a board of appeals must be established, the ordinance is void if the board is omitted.[2]

[1] N. Y.—Borea Cont. Co. v. Murdock, Supreme Court, Bronx County, New York Law Journal, May 14, 1936
St. Albans-Springfield Corporation v. Connell, 257 N. Y. 73, 177 N. E. 313 (1931)

[2] N. J.—St. Mary's of Mt. Virgin's Church v. Board of Adjustment of New Brunswick, 184 A. 516 (1936)
Somers v. Borough of Bradley Beach, 115 N. J. L. 135, 178 A. 755 (1935)

CHAPTER VII

COURT PROCEDURE

Injunction and Mandamus

SINCE 1916, when zoning began in New York City, the forms of court action employed throughout the country have tended to group themselves under injunction, mandamus, and certiorari. One will hardly find a civil action in the reported cases that is not one of these. Certiorari, or actions or appeals in the nature of certiorari, constitute the rather uniform method whereby courts review the determinations of boards of appeals. Proceedings of this sort have already been considered under "Board of Appeals" (page 153).

Municipalities may employ injunction to prevent violations of the zoning ordinance or to cause their discontinuance. A municipality, however, does not ordinarily have the right to use this remedy unless the state legislature has given it the right of injunction to prevent zoning violations, or in more general terms the right of equitable remedies in cases of such violation.[1] Injunctions pendente lite are sometimes granted.[2] Municipalities that have the right to employ injunction tend to use it for test cases instead of causing the arrest of the offender. Criminal proceedings are usually

[1] La.—New Orleans v. Liberty Shop, 157 La. 26, 101 S. 798 (1924)
Md.—Broening v. Haley, 156 Md. 605, 144 A. 836 (1929)
Mass.—Building Com'r of Brookline v. McManus, 263 Mass. 270, 160 N. E. 887 (1928)
N. J.—Dinkins v. Kip, 110 N. J. Eq. 486, 160 A. 676 (1932)
N. Y.—Walsh v. Cusack Co., 196 N. Y. S. 435 (1921)
N. C.—Elizabeth City v. Aydlett, 198 N. C. 585, 152 S. E. 681 (1930)
Elizabeth City v. Aydlett, 200 N. C. 58, 156 S. E. 163 (1930)
City of Goldsboro v. W. P. Rose Builders' Supply Co., 200 N. C. 405, 157 S. E. 58 (1931)

[2] N. Y.—Fassler v. All White Wet Wash Laundry, Inc., Supreme Court, New York County, New York Law Journal, August 11, 1931
Ficaro v. Hagedorn, Supreme Court, Bronx County, New York Law Journal, February 15, 1929
Village of Island Park v. Armstrong, Supreme Court, Queens County, New York Law Journal, August 9, 1935

an unsatisfactory way to test a zoning regulation. In many jurisdictions the municipality cannot appeal from judgments in favor of the accused. Then, too, there are always difficulties in criminal proceedings because proof of intent is necessary. This subject will be discussed in the following chapter.

It is easier and usually quicker for a municipality to enjoin a violation than for a neighbor to do so because the municipality can obtain the temporary injunction without giving a bond whereas an individual plaintiff will ordinarily need to give a bond.

The city attorney will do well before preparing his injunction papers to review the history of the regulations in the zoning ordinance on which he relies. Sometimes he may depend on an amendment and to his surprise the defendant will show the court that it was never lawfully adopted. Equally often it happens that the original ordinance was not lawfully adopted, or that the required notice was not given by publication and posting. State enabling acts for zoning usually require the establishment of a zoning commission to examine the needs of the municipality, frame a tentative ordinance and hold hearings thereon. This is required by state laws so that municipalities will not adopt zoning ordinances without careful investigation and a preliminary checking up with property owners in order to avoid too drastic or unreasonable regulations. After such an investigation the zoning commission must make a preliminary report to the local legislative body and hold a public hearing on the report. The commission must then submit its final report to the local legislature, which body must advertise and hold a public hearing on that report. All these details are specified in the state enabling act, and if the city attorney does not make sure that the several steps have been complied with he is likely to lose his case. In some states the zoning ordinance must be advertised in a specific way or else the landowner is not bound by its regulations and he will defend himself in any action by showing that he has not been given notice as required by law. Some municipalities have considered that it is enough to advertise the ordinance and not the map. The map, however, is always part of the ordinance and must be advertised.[1] Amending the ordinance does not require the help of the commission.

[1] See cases cited in note 3, p. 41

The remedy of injunction is also open to an injured neighbor. If he asks for a temporary injunction, he will need to give a bond. He must be careful to plead special damages.[1] It is not enough that he is one of a considerable community that will be hurt in a general way by the violation. His damages must be separate or different from those which the community at large sustains. He will do well to examine the history of the regulation on which he relies, to make sure that all requirements of the state enabling act for zoning have been complied with. In jurisdictions requiring advertisement of ordinances in order to constitute notice, he must see that the requirements of the enabling act as to notice have been complied with.

A more difficult field of injunctive remedy is that in which the landowner claims that the regulation, as applied to his land, is unreasonable and therefore unconstitutional and void. In the early days of zoning it was considered that the landowner should prepare his plans for a building, submit them to the building inspector, and if refused a permit should ask for a variance from the board of appeals allowing him to erect a structure that would comply so far as possible with the spirit of the law, and be the least injurious to the community. Nearly all state enabling acts for zoning provided for the establishment of a board of appeals and gave this board the power of making variance permits in all cases of practical difficulties

[1] Conn.—Fitzgerald v. Merard Holding Co., 106 Conn. 475, 138 A. 483 (1927)
Greenwich Gas Co. v. Zoning Board of Appeals of Greenwich, 113 Conn. 684, 155 A. 850 (1931)
Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)
Welton v. 40 E. Oak St. Bldg. Corp., 70 F. (2d) 377 (1934)
Md.—Bauernschmidt v. Standard Oil Co., 153 Md. 647, 139 A. 531 (1927)
Mass.—O'Brien v. Turner, 255 Mass. 84, 150 N. E. 886 (1926)
Neb.—Herbert v. Anderson, 122 Neb. 738, 241 N. W. 545 (1932)
N. J.—Dinkins v. Kip, 110 N. J. Eq. 486, 160 A. 676 (1932)
N. Y.—Atkins v. West, 222 App. Div. 308, 226 N. Y. S. 335 (1928)
Buckley v. Baldwin, 230 App. Div. 245, 244 N. Y. S. 295 (1930)
Cohen v. Rosevale Realty Co., 121 Misc. 618, 202 N. Y. S. 95, affd. 211 App. Div. 812, 206 N. Y. S. 893 (1924)
Keenly v. McCarty, 137 Misc. 524, 244 N. Y. S. 63 (1930)
Nagaven Realties, Inc. v. Banzhaf, 149 Misc. 361, 267 N. Y. S. 729 (1933)
St. Basil's Church v. Kerner, 125 Misc. 526, 211 N. Y. S. 470 (1925)
Tishman v. 1400 Broadway Corp., Supreme Court, New York County, New York Law Journal, January 28, 1931
Whitridge v. Park, 100 Misc. 367, 165 N. Y. S. 640, 179 App. Div. 884 (1917)
Pa.—White v. Old York Road Country Club, 318 Pa. 346, 178 A. 3, 318 Pa. 569, 179 A. 434, 185 A. 316 (1936)

and unnecessary hardships. The fact that the statute provided this method of protecting the community caused courts to insist in many cases that the landowner should first exhaust the remedy given him by law before seeking to annihilate the regulations on the ground of unreasonableness and unconstitutionality. Some students of zoning hoped that the development of this subject would be such that in all cases where the strict letter of the law bore oppressively on the landowner he would be able to obtain a variance permit that would ameliorate the harshness of the regulation and allow him to build a structure suitable for the particular location. Such a procedure would have preserved the ordinance itself intact, while still allowing a structure to be erected that was reasonable in the particular environment. Those who took this view considered that ordinances should be protected against frequent punctures on the ground of unconstitutionality and that better results would be obtained by adapting variance permits to the needs of the environment. They pointed out that these variances would always be subject to the approval of courts, and that it was better for the courts to bring about a reasonable result through proceedings in the nature of certiorari than to declare a regulation unconstitutional. If this view had been continued by the courts it is likely that local legislative bodies would have introduced arbitrary features into the zoning maps, depending on the boards of appeals to ameliorate them in suitable cases from time to time.

Where the zoning regulation is unreasonable or arbitrary for a whole street or locality, it is undoubtedly correct for the court to pronounce the zoning unconstitutional and not compel the injured landowner to prepare plans and apply to the board of appeals for a variance. It can probably now be said that courts will be inclined to compel the landowner to apply for a variance only where his particular plot is in an exceptional situation and is unique in relation to a fair adjustment. If, however, the lot is one of many that are in the identical situation, the court will be likely to excuse the injured party from applying to the board of appeals for a variance, and to declare directly or indirectly that it is the duty of the local legislative body to alter the map so that the zoning regulations will be reasonable. Consequently it may now be considered that injunction is available to the injured landowner whose particular lot

is one of a number that are unreasonably and arbitrarily zoned.[1] But if his lot stands alone and the neighborhood is reasonably zoned, he cannot expect the court to declare the zoning void, but he must apply to the board of appeals for a variance in his particular instance. In proper cases therefore the landowner will seek to enjoin the building inspector and other officials from enforcing or continuing the threat of enforcement of a regulation that affects a substantial area unreasonably. The laws of some states provide for declaratory judgments, and these may be sought in such cases as are here described. It is likely, however, that whether the state law provides for declaratory judgments or not, the same result can be obtained by an action of injunction against enforcing officials. The real basis of this action is that the existing zoning is in actuality unconstitutional and void, and yet is maintained by the local legislative body as a constant threat against the land. (See also discussion at page 160 *et seq.*)

Mandamus is available to the landowner to compel the administrative officer to do his duty as required by law. Perhaps the most frequent group of cases where mandamus is employed by landowners is where the building inspector refuses a permit which he ought lawfully to grant. It has frequently happened that building inspectors will postpone the issue of a lawful permit in the expectation that the local legislative body will soon alter the map. Courts frown on this temporary holding up of permits, and declare that they must be granted in accordance with the present law and not in accordance with what the building inspector expects the law to be at some future time. The landowner who obtains a permit under the circumstances may find that a change of the map made after he obtains his permit will still prevent him from building. Usually, however, if he orders material to be fabricated and fabrication is begun and the footing course of the foundation of the structure is laid, courts will hold—at least those in and near New York City—that it is unreasonable to divest him of his rights under his permit. In this connection it is well to recall that police-power regulations are not contractual but are instituted for the community health, safety, morals, and general welfare, and the community may

[1] Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931) See also cases cited in note 2, p. 162

insist that it is not concerned with money damages to the landowner.

It has been held that an owner of a structure sought to be removed for violation of a regulation is a necessary party.[1]

Sometimes the local legislative body will change the map without taking the necessary preliminary steps or without heeding a valid 20 percent protest. Thus a zoning designation will appear on the map which is in fact not real, because no valid change has been made. The landowner who desires to erect a building that is lawful under the map as it ought to be but which may be unlawful under the mistaken change, will resort to mandamus against the building inspector, requesting the court to disregard the appearance of the change and command the building inspector to issue a permit in accordance with the reality.[2]

It is not always the builder who resorts to mandamus in cases like this. Sometimes a neighbor will ask the court to decide whether the change of map, injurious to him, was lawfully made. He will ordinarily make use of injunction to prevent the builder from violating the zoning as it ought to be shown on a true map. But sometimes the neighbor is unwilling to give a bond to procure a temporary injunction, or will be compelled to wait too long to have his trial of a permanent injunction. In the meantime the builder may obtain his permit and put his building well under way. Under these circumstances courts are sometimes likely to waive the equities involved. If the builder has proceeded with no wrongdoing on his part, the court may uphold him in the particular case. This is because courts dislike to cause builders to tear down what they have erected under an apparently valid permit from the municipality. Where, therefore, the neighbor desires to act promptly, he will ask the court to issue mandamus against the municipal legislative body and its clerk or secretary for an order compelling the change of the minutes so that they will declare the lawful result instead of the unlawful and mistaken result.[3]

[1] N. Y.—Morton v. Bales, 226 App. Div. 693, 233 N. Y. S. 540 (1929)
Stegle v. Bales, 226 App. Div. 816, 234 N. Y. S. 901 (1929)

[2] N. Y.—Leonard v. Tappen, 244 App. Div. 817, 280 N. Y. S. 1000, affd. 269 N. Y. 567, 199 N. E. 674 (1935)
Palmer v. Mann, 206 App. Div. 484, 201 N. Y. S. 525, affd. 237 N. Y. 616, 143 N. E. 765 (1924)

[3] Smidt v. McKee, 262 N. Y. 373, 186 N. E. 869 (1933)

It is not necessary to discuss here the differences in situations which warrant resort to mandamus, injunction, or certiorari because the subject of zoning does not show departures from general practice. There are, however, a few cases in which the different methods of procedure are discussed.[1]

An issue of fact warrants an alternative writ of mandamus and not a peremptory writ.[2]

An alternative writ of mandamus ordinarily carries the trial before a jury.[3]

Care must be taken to join all necessary parties.[4]

Procedural Problems

The legal problems connected with zoning litigation constantly recur. They can nearly always be solved in accordance with principles established in other fields. But because practitioners so often make the same mistakes in analyzing zoning situations, some of these problems are briefly mentioned.

In injunction and mandamus the petitioner often desires to allege unconstitutionality. He should state that the regulation violates a particular section of the state or federal constitution, designate the section, and give its purport. Merely to state that the regulation is unconstitutional is insufficient or hazardous.

As zoning is based on the police power, litigants often expect to carry their issue to the United States Supreme Court. Not every police-power case issue can reach that body. It is possible only

[1] Colo.—Hedgcock v. Arden Realty & Investment Co., 98 Colo. 522; 57 P. (2d) 891 (1936)
La.—Kreher v. Quinlan, 182 La. 721, 162 S. 577 (1935)
Miss.—City of Jackson v. McPherson, 158 Miss. 152, 130 S. 287 (1930)
N. J.—Gallo v. Moffett, 8 N. J. Misc. 40, 148 A. 152 (1930)
Goldberg v. Mayor and Aldermen of Jersey City, 6 N. J. Misc. 564, 142 A. 355 (1928)
N. Y.—Dillon v. O'Shaughnessy, 222 App. Div. 772, 226 N. Y. S. 37 (1927)
Fairchild Sons, Inc. v. Rogers, 246 App. Div. 555, 282 N. Y. S. 916 (1935)
Hart v. Bailey, Supreme Court, Kings County, New York Law Journal, December 24, 1935
Towers Management Corporation v. Thatcher, Supreme Court, Kings County, New York Law Journal, September 10, 1935, 246 App. Div. 835, 286 N. Y. S. 435, 271 N. Y. 94, 2 N. E. (2d) 273 (1936)

[2] N. Y.—Matter of Peck, 136 Misc. 294, 240 N. Y. S. 634 (1930)
Radcliffe v. Livingston, 223 App. Div. 862, 229 N. Y. S. 20 (1928)

[3] Freeland v. Sargeant, 6 N. J. Misc. 906, 143 A. 73 (1928)

[4] Costa v. Dandrow, 12 N. J. Misc. 822, 175 A. 205 (1934)

when the regulation, or some other act of government, has deprived the appellant of his right of due process of law. At least this is a good rule to follow in a zoning case.[1]

To bring the constitutional issue to the United States Supreme Court, the injured party must raise the particular constitutional provision in the court below and actually discuss it.[2]

A rule of conduct for the guidance of boards of appeals will not be interpreted by the United States Supreme Court. As it was made by the state or a local legislature, its scope must be determined by the state courts.

In the early days of zoning it was customary for city attorneys and sometimes courts to hold that a newcomer who knowingly purchased into a zoning environment with full knowledge of the zoning regulations was in a worse position than the owner on whom the regulations were originally imposed. Not so. It is the land that is regarded and not the owner. The situation and environment of the land are the same in either case.[3]

An aggrieved neighbor cannot enjoin a violation of the ordinance unless he pleads and proves special damages. It is not enough for him to plead damages for they might be the same as all his neighbors suffered.[4]

[1] Convention of Protestant Episcopal Church v. Mayor and City Council of Baltimore, Md., Baltimore City Court, Baltimore Daily Record, October 17, 1928—Greenway Apartment Company v. Convention of Protestant Episcopal Church, 280 U. S. 525, 50 S. Ct. 87 (1929)

[2] Rosevale Realty Co. v. Kleinert, 268 U. S. 646, 45 S. Ct. 618 (N. Y., 1925)

[3] Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767 (1932)

[4] Conn.—Fitzgerald v. Merard Holding Co., 106 Conn. 475, 138 A. 483 (1927)
Greenwich Gas Co. v. Zoning Board of Appeals of Greenwich, 113 Conn. 684, 155 A. 850 (1931)
Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N. E. 710 (1930)
Iowa—Anderson v. Jester, 206 Iowa 452, 221 N. W. 354 (1928)
Md.—Bauernschmidt v. Standard Oil Co., 153 Md. 647, 139 A. 531 (1927)
Rutherford v. Mayor and City Council of Baltimore, City Court, Baltimore Daily Record, October 25, 1923, 145 Md. 363, 125 A. 725 (1924)
Mass.—Ayer v. Cram, 242 Mass. 30, 136 N. E. 338 (1922)
N. J.—Gaston v. Ackerman, 6 N. J. Misc. 696, 142 A. 546 (1928)
N. Y.—Edbro Realty Co. v. Walsh, Supreme Court, New York County, New York Law Journal, September 2, 1924
In re Pane, Supreme Court, Kings County, New York Law Journal, December 20, 1928
Roock v. Womer, 233 App. Div. 566, 253 N. Y. S. 357 (1931)
St. Basil's Church v. Kerner, 125 Misc. 526, 211 N. Y. S. 470 (1925)

Footnote continued on page 178.

Where a permit holder has bought his building material or started his foundations the courts will not cause the revocation of his permit on the change of district. In some cases they have held that he has a vested right, although it is not entirely clear how any one can perfect a vested right against a police-power regulation.[1]

Where the building inspector purposely delays a lawful permit pending proposed changes in the map, the courts will by mandamus order him to issue the permit.[2]

Footnote continued from page 177.

Sherman v. Walsh, Supreme Court, Kings County, New York Law Journal, May 5, 1930
Ohio—Howell v. Cooper, 33 Oh. A. 287, 168 N. E. 757 (1929)
Pritz v. Messer, 112 Oh. St. 628, 149 N. E. 30 (1925)
Pa.—Appeal of Johnson, 93 Pa. Super. 599 (1928)
In re American Reduction Co., Court of Common Pleas, Allegheny County, February 12, 1924, 15 Minicipal Law Reporter 183, 72 Pittsburgh Legal Journal 321, 326
R. I.—Madden v. Zoning Board of Review of Providence, 48 R. I. 175, 136 A. 493 (1927)

[1] Mass.—Spector v. B'l'd'g Inspector of Milton, 250 Mass. 63, 145 N. E. 265 (1924)
Mich.—City of Lansing v. Dawley, 247 Mich. 394, 225 N. W. 500 (1929)
N. Y.—Feitelberg v. Bales, Supreme Court, Queens County, New York Law Journal, January 4, 1928
Fuller v. Schwab, 124 Misc. 659, 208 N. Y. S. 289 (1925)
Kalvin v. Kleinert, Supreme Court, Kings County, New York Law Journal, January 31, 1923, affd. 206 App. Div. 683, 199 N. Y. S. 943 (1923)
City of New York v. Caulwal Construction Co., 261 N. Y. 578, 185 N. E. 746 (1933)
New York State Investing Co. v. Brady, 214 App. Div. 592, 212 N. Y. S. 605 (1925)
Ohlau v. Kleinert, 121 Misc. 386, 201 N. Y. S. 83, affd. 209 App. Div. 824, 204 N. Y. S. 933 (1924)
Ortenberg v. Bales, 224 App. Div. 87, 229 N. Y. S. 550, affd. 250 N. Y. 598, 166 N. E. 339 (1929)
Palmer v. Walsh, Supreme Court, Queens County, New York Law Journal, June 6, 1922
Pelham View Apartments v. Switzer, 130 Misc. 545, 224 N. Y. S. 56 (1927)
People v. Stanton, 125 Misc. 215, 211 N. Y. S. 438 (1925)
Sagamore Road Corp. v. Lee, 224 App. Div. 744, 230 N. Y. S. 58, affd. 250 N. Y. 532, 166 N. E. 313 (1929)

[2] Iowa—Rehmann v. City of Des Moines, 200 Iowa 286, 204 N. W. 267 (1925), 204 Iowa 798, 215 N. W. 957 (1927)
La.—Hundley v. City of Alexandria, 164 La. 624, 114 S. 491 (1927)
Sansone v. City of New Orleans, 163 La. 860, 113 S. 126 (1927)
N. J.—Atlantic Broadcasting Co. v. Wayne Tp., 109 N. J. L. 442, 162 A. 631 (1932)
Butvinik v. Mayor and Aldermen of Jersey City, 6 N. J. Misc. 803, 142 A. 759 (1928)
Commuters' Coach Co. v. Minton, 7 N. J. Misc. 478, 146 A. 921 (1929)
Holdsworth v. Hague, 9 N. J. Misc. 715, 155 A. 892 (1931)

Footnote continued on page 179.

An action for damages against the municipality because of alleged arbitrary zoning or for non-issue of a permit will not lie. If the regulation is arbitrary it is unconstitutional and void, and the courts will so declare. If it is reasonable the courts will see that the applicant receives his lawful permit. A few state enabling acts, now fortunately repealed, provided for damages.

Misrepresentation by the applicant for a permit is cause for revoking it.[1]

An application based on a pretended or moot case will be denied, or if granted will be revoked.[2]

The power to revoke inheres in the body having power to grant the permit. A village board cannot revoke a lawful permit granted by the lawful authority under a zoning ordinance.[3] But where the

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Footnote continued from page 178.

Horowitz v. Rath, 9 N. J. Misc. 203, 153 A. 250 (1931)
Linwood Co. v. Gardner, 9 N. J. Misc. 139, 153 A. 99 (1931)
Mongiello Bros., Inc. v. Board of Com'rs of Jersey City, 10 N. J. Misc. 131, 158 A. 325 (1932)
Pabst v. Ferner, 8 N. J. Misc. 621, 151 A. 368 (1930)
Paffendorf v. Lyndhurst Tp., 1 N. J. Misc. 289, 129 A. 389 (1923)
Reimer v. Dallas, 129 A. 390 (1925)

N. Y.—Calton Court, Inc. v. Switzer, 221 App. Div. 799, 223 N. Y. S. 856 (1927)
Voelcker v. Seaman, Supreme Court, Kings County, New York Law Journal, July 2, 1928

N. C.—Bizzell v. Board of Aldermen of Goldsboro, 192 N. C. 348, 135 S. E. 50 (1926)

Ohio—Hauser v. Erdman, 113 Oh. St. 662, 150 N. E. 42 (1925)
Ice & Fuel Co. v. Kreuzweiser, 120 Oh. St. 352, 166 N. E. 228 (1929)

Pa.—Coyne v. Prichard, 272 Pa. 424, 116 A. 315 (1922)
Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930)

Tex.—Marshall v. City of Dallas, 253 S. W. 887 (1923)
McEachern v. Town of Highland Park, 34 S. W. (2d) 676, 124 Tex. 36, 73 S. W. (2d) 487 (1934)

[1] N. J.—Lehigh Valley R. Co. v. Mayor, etc., of Jersey City, 7 N. J. Misc. 154, 144 A. 578, 106 N. J. L. 248, 147 A. 555 (1929)

N. Y.—Village of Attica v. Day, 134 Misc. 882, 236 N. Y. S. 607, affd. 230 App. Div. 776, 243 N. Y. S. 915 (1930)
Caulwal Construction Co. v. Burwell, 136 Misc. 259, 240 N. Y. S. 456 (1930)
Matter of Fontana, Supreme Court, Kings County, New York Law Journal, May 19, 1925
City of New York v. Caulwal Construction Co., 261 N. Y. 578, 185 N. E. 746 (1933)
Stein v. Walsh, Supreme Court, Kings County, New York Law Journal, July 15, 1929

Ohio—Santangelo v. City of Cincinnati, 25 Ohio N. P. (N.S.) 49 (1924)

Wis.—Wasserman v. O'Brien, 201 Wis. 356, 230 N. W. 59 (1930)

[2] Mo.—Myers v. Shinnick, 19 S. W. (2d) 676 (1929)

N. J.—Muelberger v. Wisloh, 2 N. J. Misc. 962, 128 A. 924 (1924)

[3] Atlantic Broadcasting Co. v. Wayne Tp., 109 N. J. L. 442, 162 A. 631 (1932)

board has power to grant the permit it has the power in a proper case to revoke it.[1] If one does not protest against the passage of an ordinance on the grounds of unconstitutionality, it has been held in one case that he is estopped from making such an attack later. This seems very unreasonable.[2]

A permit is not a contract between the property owner and municipality, but is nothing more than a step in the administration of laws for the protection of the community. It is not based on a consideration.[3]

Permits violative of the ordinance are unlawful. They are not made lawful by a provision which assumes to allow temporary permits.[4]

Questions of money damages do not often arise in zoning cases before the courts. All claims for damages by property owners because zoning regulations lessen the value of their property will be promptly ruled out. If the regulation is reasonable it will be enforced under the police power and there will be no damages. If it is unreasonable it will be pronounced void and no damages can be collected. Various questions regarding damages arise, however, in zoning cases.[5] These sometimes have to do with the imposition of conditions or relate to situations where an injunction is issued.

Courts frequently inspect the land or building involved in controversy, sometimes because they desire to do so and sometimes on the request of a party. The court usually asks the consent of all parties to be entered. It is doubtful whether inspections by the court help substantially in arriving at a satisfactory result. Ap-

[1] Morania Sales Co. v. Anderson, Supreme Court, Kings County, N. Y., New York Law Journal, August 9, 1930

[2] Coombs v. Larson, 112 Conn. 236, 152 A. 297 (1930)

[3] Iowa—Rehmann v. City of Des Moines, 200 Iowa 286, 204 N. W. 267 (1925), 204 Iowa 798, 215 N. W. 957 (1927)
Pa.—Shooster v. Devlin, 305 Pa. 440, 158 A. 161 (1932)

[4] Ellish v. Zoning Board of Appeals of Ramapo, 141 Misc. 916, 253 N. Y. S. 547 (1931)

[5] Cal.—Sapiro v. Frisbie, 93 Cal. A. 299, 270 P. 280 (1928)
Mass.—Locatelli v. City of Medford, 287 Mass. 560, 192 N. E. 57 (1934)
N. Y.—Silverman v. Goldmann Realty Corp., 232 App. Div. 292, 249 N. Y. S. 505 (1931)
City of Utica v. Hanna, 249 N. Y. 26, 162 N. E. 573 (1928)
Wis.—Bouchard v. Zetley, 196 Wis. 635, 220 N. W. 209 (1928)
Pera v. Village of Shorewood, 176 Wis. 261, 186 N. W. 623 (1922)

pellate courts are often confused because the entire case is not in the record.

Courts dislike to hold that a legislative body has acted arbitrarily because it has differed from the view of the court. In certiorari cases the court hesitates to substitute its opinion for the conclusion of experts.[1]

Counsel cannot ordinarily expect federal courts to help them in the interpretation of zoning ordinances or to furnish substituted procedure for procedure through boards of appeals.[2]

Problems involving detail procedure regarding constitutionality are constantly arising in zoning cases. Where unconstitutionality is alleged courts have held in some cases that there can be immediate access to court.[3] (See also page 172 *et seq.*)

An entire ordinance will not be declared void because a part of it is void.[4] The ordinance being declared void in a certiorari case, mandamus was granted thereafter.[5]

[1] Mymaud Const. Co. v. Walsh, Supreme Court, Kings County, N. Y., New York Law Journal, March 5, 1926

[2] N. Y.—Arseekay Syndicate, Inc. v. Burwell, 53 F. (2d) 705 (1931)
Morrison v. Pettigrew, 14 F. (2d) 453 (1926)

[3] Conn.—Appeal of Holley, 110 Conn. 80, 147 A. 300 (1929)
Ill.—Phipps v. City of Chicago, 339 Ill. 315, 171 N. E. 289 (1930)
Vonesh v. City of Berwyn, 324 Ill. 483, 155 N. E. 276 (1927)

[4] Cliffside Park Realty Co. v. Borough of Cliffside Park, 96 N. J. L. 278, 114 A. 797 (1921)

[5] Mathewson v. Brockett, 127 Misc. 895, 217 N. Y. S. 353 (1926)

CHAPTER VIII

CRIMINAL PROCEEDINGS

THE violation of a zoning regulation is usually made a misdemeanor and is punishable by fine or imprisonment or both. A penal proceeding is not a good way of testing the legality of a regulation, although it affords a summary method of enforcement when legality is well settled. Some of the unfortunate decisions of courts, which set back the progress of zoning in several states, were in part due to the testing of a regulation by arresting an alleged violator.[1] In such a proceeding all of the presumptions are in favor of the violator, and in the early days of zoning, when the whole subject was novel, the magistrate was the more inclined to give the accused the benefit of the doubt. The evidence presented by the municipality was often ill-prepared and made a poor foundation if the accused appealed to higher courts. If the accused was successful in the trial before the magistrate, the municipality usually could not appeal at all.[2] It is quite likely that in many states zoning would have been established sooner if municipalities had refrained from penal proceedings for test purposes and had begun actions of injunction.

[1] La.—City of Shreveport v. Moran, 174 La. 271, 140 S. 475 (1932)
Me.—Millett v. Hayes & Co., 132 Me. 12, 164 A. 741 (1933)
Mass.—Building Com'r of Brookline v. McManus, 263 Mass. 270, 160 N. E. 887 (1928)
Minn.—State v. Burgenstein, Municipal Court, Minneapolis, Minneapolis Daily Star, December 11, 1924
N. J.—Apter v. City of Newark, 6 N. J. Misc. 554, 142 A. 310 (1928)
Durkin Lumber Co. v. Fitzsimmons, 106 N. J. L. 183, 147 A. 555 (1929)
Sarg v. Hooper, 3 N. J. Misc. 364, 128 A. 376 (1925)
N. Y.—People v. Sagat, 204 App. Div. 485, 198 N. Y. S. 449 (1923)
Phillips v. Batista, City Court, New Rochelle, July 11, 1930
Pa.—City of Bethlehem v. Goodman, Court of Common Pleas, Northampton County, April 4, 1927

[2] However, see City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094 (1897)
N. Y.—City of New Rochelle v. Beckwith, City Court, New Rochelle, Westchester Law Journal, August 18, 1933, 268 N. Y. 315, 197 N. E. 295 (1935)
City of New Rochelle v. Blossom Cleaners & Dyers, Inc., City Court, New Rochelle, Westchester Law Journal, October 17, 1933

A provision making each day that a violation continues a separate offense is lawful.[1]

A municipality cannot apply to a court for equitable relief, as for instance for an order or judgment of injunction, unless this remedy is given the municipality by statute.

The regulations of a zoning ordinance are enforced by the building department, or by some department or person specifically named in the ordinance, and cannot be enforced by another department such as the board of health.[2]

[1] Wright v. City of Guthrie, 150 Okl. 171, 1 P. (2d) 162 (1931)

[2] Allen v. City of Paterson, 98 N. J. L. 661, 121 A. 610, 99 N. J. L. 532, 124 A. 924 (1924)

CHAPTER IX

CONTRACTUAL RELATIONS

Contracts Improper

CONTRACTS have no place in a zoning plan. Zoning, if accomplished at all, must be accomplished under the police power. It is a form of regulation for community welfare. Contracts between property owners or between a municipality and a property owner should not enter into the enforcement of zoning regulations.[1]

Sometimes local legislatures state that they will make certain zoning changes if property owners file agreements either with one another or with the city. This is wrong, unnecessary, and unfair. The local legislative body is taking advantage of its superior position whenever it tries to force a property owner to enter into a contract in order to have a permit to which he is entitled, or before zoning regulations are made which are justified by well-settled principles. There is no consideration for such a bargain because the municipality cannot receive a consideration for taking steps in legislation. Its legislation is not and ought not to be for sale.

Officials cannot make a valid contract with landowners regarding the street on which a building must front.[2]

Zoning districts are sometimes stated by councils to follow the boundaries marked by certain private restrictions. No fault can be found with this method of denoting locations but an accurate map is much better. It is a mistake, however, to use the fact of existing private restrictions as justification for a certain kind of zoning. The environment should justify the zoning regardless of the private restrictions. Wherever municipalities have made zoning regulations dependent upon the continuation of private restrictions confusion has followed.[3] The well-known Murray Hill restric-

[1] Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N. W. 707 (1930)

[2] Williams v. City of Fargo, 63 N. D. 183, 247 N. W. 46 (1933)

[3] N. Y.—Rosevale Realty Co. v. Kleinert, 204 App. Div. 883, 197 N. Y. S. 940 (1922) Rosevale Realty Co. v. Kleinert, 237 N. Y. 580, 143 N. E. 750, 268 U. S. 646, 45 S. Ct. 618 (1925)

tions in Manhattan never clarified the zoning regulations or assisted in their interpretation, although in the early days there were constant references to these private restrictions in the presentation of arguments based on zoning.[1]

Counsel will do well when presenting a zoning case to the court to omit all reference to contracts between parties and contractual restrictions running with the land. For the same reason, when presenting a case based on contracts or private restrictions, counsel will omit references to zoning regulations.

The doctrine of estoppel does not apply to zoning regulations because they are based on the police power.[2]

Effect of Zoning on Private Restrictions

The New York building zone resolution contains the following provision in its Section 20:

> It is not intended by this resolution . . . to interfere with or abrogate or annul any easements, covenants or other agreements between parties; provided, however, that where this resolution imposes a greater restriction upon the use of buildings or premises or upon height of buildings or requires larger yards, courts or other open spaces than are imposed or required by such existing provision of law or ordinance or by such rules, regulations or permits or by such easements, covenants or agreements, the provisions of this resolution shall control.

Insofar as these words refer to easements, covenants, or other agreements between parties, they are unfortunate and misleading. They have been widely copied throughout the country. It is evident that the enforceability of a police-power ordinance cannot be affected by covenants of private restrictions. If the provision merely referred to noninterference, it would at least be harmless, but it goes further and states that the greater restriction shall control. The municipal authorities enforcing the zoning regulations have nothing whatever to do with private restrictions. Zoning regulations and private restrictions do not affect each other.[3]

[1] Sheldon v. Board of Appeals of New York, 234 N. Y. 484, 138 N. E. 416 (1923)

[2] Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1933)

[3] D. C.—Castleman v. Avignone, 56 App. D. C. 253, 12 F. (2d) 326 (1926)
Ind.—Bachman v. Colpaert Realty Corp., 194 N. E. 783 (1935)
Iowa—Burgess v. Magarian, 214 Iowa 694, 243 N. W. 356 (1932)

Footnote continued on page 186.

No mention of private restrictions should be made in a zoning ordinance. For instance, let us suppose that in a business zone there is a private restriction against business. If the owner applies for a store permit, he will receive it as a matter of right. If, however, he proceeds to erect a store, he will probably be enjoined by some neighbor entitled to enforce the private restriction. He cannot defend himself by saying that the regulations of the business zone prevent him from erecting anything but a store. He has the same right to erect a residence as a store. It is obvious that the zoning and the private restrictions are unrelated. One is based on the police power, the other on a contract. The municipality enforces the former by refusing a building permit or ousting a nonconforming use. A neighbor having privity of title enforces the latter by injunction or an action for damages.

A restrictive covenant cannot be enforced by the municipality,[1] unless in the rare case where the municipality owns land subject to restrictive covenants and has such privity of title as will enable it to bring suit like a private person.

The fact that land has been zoned for business will not be deemed to change the character of the locality so as to warrant the annulment of private restrictions prohibiting business.[2] But it

Footnote continued from page 185.

Mass.—Jenney v. Hynes, 282 Mass. 182, 184 N. E. 444 (1933)
Vorenberg v. Bunnell, 257 Mass. 399, 153 N. E. 884 (1926)
N. J.—Green v. Jones, 5 N. J. Misc. 188, 135 A. 802 (1927)
N. Y.—Cohen v. Rosevale Realty Co., 120 Misc. 416, 199 N. Y. S. 4, 206 App. Div. 681, 199 N. Y. S. 916 (1923)
Fortieth St. & Park Ave. Inc. v. Fox, Supreme Court, New York County, New York Law Journal, January 17, 1927, 248 N. Y. 527, 162 N. E. 511 (1928)
Kimball Co. v. Fox, 120 Misc. 701, 200 N. Y. S. 267, affd. 239 N. Y. 554, 147 N. E. 192 (1924)
Moos v. Duany, Supreme Court, Westchester County, Westchester Law Journal, January 3, 1933
Rosevale Realty Co. v. Kleinert, 204 App. Div. 883, 197 N. Y. S. 940 (1922)
Rosevale Realty Co. v. Kleinert, 237 N. Y. 580, 143 N. E. 750, 268 U. S. 646, 45 S. Ct. 618 (1925)
Vesell v. Board of Standards and Appeals, 137 Misc. 806, 243 N. Y. S. 518, affd. 225 App. Div. 742, 232 N. Y. S. 904 (1928)
Ore.—Ludgate v. Somerville, 121 Ore. 643, 256 P. 1043 (1927)
R. I.—Walker v. Ursillo, 53 R. I. 120, 164 A. 559 (1933)
Wis.—Kramer v. Nelson, 189 Wis. 560, 208 N. W. 252 (1926)
Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N. W. 838 (1929)

[1] N. Y.—Rosevale Realty Co. v. Kleinert, *ante*

[2] Mass.—Snow v. Van Dam, 197 N. E. 224 (1935)
R. I.—Walker v. Ursillo, 53 R. I. 120, 164 A. 559 (1933)

has been held that the zoning map is admissible in the evidence.[1]

In the early days of zoning it was claimed that the regulations were encumbrances on land. This contention was disposed of in one of the first zoning cases that arose in New York City. A contract vendee refused to take a deed because of a zoning regulation not mentioned or excepted in the contract of sale. The court declared that like all other police-power regulations it would be enforced if reasonable, and it need not be excepted in a contract for the sale of land.[2] Although these New York decisions have been followed by courts throughout the country many title companies and conveyancers continue to except zoning regulations as if they were encumbrances.

Zoning is in no way hostile to private restrictions. They can make desirable requirements for the development of land that zoning cannot; they can also be based on esthetic reasons, such as architectural style or prevention of flat roofs, or on financial reasons, such as required cost of the house. Zoning regulations cannot be based on such reasons because they do not relate to the community health and safety. Private restrictions may well supplement zoning regulations. There will never be conflict between the two. Courts in trying a zoning case will ordinarily exclude evidence of private restrictions, and in trying a private restriction case will exclude evidence of the zoning. This is done on the grounds of immateriality.

[1] Kokenge v. Whetstone, Court of Common Pleas, Hamilton County, Ohio, December, 1935

[2] Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920)

CHAPTER X

DEFINITIONS IN THE ORDINANCE

Definitions Sometimes Do More Harm Than Good

IT IS customary to include a list of definitions in a zoning ordinance. Their purpose should be to give the unique meanings of certain words as used in the ordinance. If a word is employed in its common and ordinary meaning it is better not to define it. Sometimes, as in a contract, a single word is used to mean a phrase and in such a case the word should be placed in the list and defined.

Some have thought that a standardized list of definitions for zoning ordinances would be desirable. This is probably not so. No two cities are alike. Their needs and their fields and methods of regulation are different. A summer resort is different in these respects from a manufacturing city; a seaport from a mining town. A standardized list of definitions, if used, would probably cause misunderstanding and increase litigation.

Definitions so often injure an ordinance instead of helping it that some examples of good and bad definitions are copied from actual ordinances.

Examples of Good Definitions

The following definitions are helpful in the ordinances where they occur:

A lot is the parcel of land on which a principal building and its accessories are placed, together with the required open spaces.[1]

A court is a required open, unoccupied space on the same lot and fully enclosed on at least three adjacent sides by walls of the building. An outer court is any court facing for its full required width on a street, or on any other required open space not a court. An inner court is any other required court.

[1] A lot in zoning is the land on which one main building stands with the required yards. In determining the rear lot line the court will consider the manner in which lots have been laid out and the customs of surveyors. Bianco v. City Engineer of North Adams, 284 Mass. 20, 187 N. E. 101 (1933)

An accessory building is a building subordinate to the main building on a lot and used for purposes customarily incidental to those of the main building.

A family is any number of individuals living together as a single housekeeping unit and doing their cooking on the premises.

A story is that part of any building comprised between any floor and the floor or roof next above; the first story of a wall is the lowest story which is 75 percent, or more, above the average level of ground adjacent to said wall.[1]

An apartment dwelling is a dwelling for three or more families, living independently of each other and doing their cooking upon the premises.

Building is used to include a building, shed, garage, stable, greenhouse, or other accessory building.

Corner plot means a plot on a corner fronting not more than fifty feet on one street and not more than two hundred feet on an intersecting street.

Front street means the street upon which a plot abuts. If a plot abuts upon more than one street, it means the street designated as the front street in an application for a building permit, at the applicant's election.

Street grade means the established grade of the front street or other higher street upon which the plot abuts at the mid-point of the frontage of the plot thereon or if there is no established grade, street grade means the existing grade of such street at such mid-point.

The street line is the dividing line between a lot and a public street, road or highway, or a private street, road or way over which two or more dominant estates have the right of way.

The height of a building is the vertical distance from the curb level to the mean level of the slope of the main roof. The height of a wall is the vertical distance from the curb level to the mean level of the top of the wall, including any dormers or gables on the wall.

A one-family detached dwelling is a house accommodating but a single family and having no party wall or walls in common with an adjacent house or houses.

A one-family semi-detached dwelling is a one-family house having one party wall in common with an adjacent house, the two houses together, however, accommodating but two families, one family living on either side of the party wall.

A two-family detached dwelling is a house accommodating altogether but two families with one family living over the other. Such dwelling has moreover no party wall or walls in common with an adjacent house or houses.

Building area is the aggregate of the maximum horizontal cross section area of the main building on a lot, excluding cornices, eaves, gutters, or chimneys projecting not more than eighteen inches, steps, one-story open

[1] Madden v. Zoning Board of Review of Providence, 48 R. I. 175, 136 A. 493 (1927)

porches, bay windows not extending through more than one story and not projecting more than five feet, balconies and terraces.

Rear yard is the required open space extending along the rear lot line (not a street line) throughout the whole width of the lot, excluding cornices, eaves, gutters, chimneys projecting not more than twelve inches, and uncovered steps.

Side yard is the required open space extending along the side lot line and extending from the street to the rear yard, excluding cornices, eaves, gutters and chimneys projecting not more than twelve inches, and uncovered steps.

Front yard is the required open space between the street line and the nearest part of any building on the lot, excluding cornices, eaves or gutters projecting not more than thirty inches, steps, one-story open porches, bay windows not extending through more than one story and not projecting more than five feet, chimneys, open balconies and terraces.

Single-family dwelling is a dwelling used or intended to be used or occupied as a residence by one family only.

Multi-family dwelling is a dwelling used or intended to be used or occupied as a residence by three or more families.

Examples of Bad Definitions

The following definitions are also copied from ordinances. These are probably harmful.

A lot is a parcel of land under one ownership, the location, dimensions and boundaries of which are determined by the latest official record.

A corner lot is a lot at the junction of and fronting on two or more intersecting streets.

Alley: A public or privately owned thoroughfare less than twenty-four feet in width.

Business: The purchase, sale or storage, or other transaction involving the handling or disposition of any article, substance or commodity. It also includes advertising signs, billboards, office and recreational or amusement enterprises conducted for private profit.

Street or Public Street: Includes all lands established by dedication, use, or act of the Common Council, or laid out upon the City Map as highways, and shall be synonymous with roads, avenues, alleys, parkways, or terraces and other terms commonly applied to public highways.

Retail Store: Any building or structure in which one or more articles of merchandise or commerce are sold.

The Word "Premises"

The word "premises" was introduced in the New York City building zone resolution in provisions such as "no building or prem-

ises shall be used." It would have been better to use the word "land." "Premises" has been copied in many ordinances and is always understood to mean land.[1]

[1] N. Y.—Borgeaud v. Fassler, 153 Misc. 546, 274 N. Y. S. 599 (1934)
Monument Garage Corp. v. Levy, 149 Misc. 791, 268 N. Y. S. 213, 266 N. Y. 339, 194 N. E. 848 (1935)
City of New York v. Off-Streets Parking, Inc., 153 Misc. 150, 274 N. Y. S. 562, affd. 242 App. Div. 767, 275 N. Y. S. 334 (1934)
People v. Jones, City Magistrate's Court, First District, Borough of Queens, October 8, 1931

CHAPTER XI

PARTICULAR BUILDINGS AND USES

IN this concluding chapter residences are first discussed and then other buildings and uses. Except for that division the different buildings and uses are considered without any effort to group them. The author hopes that framers of zoning ordinances, and city attorneys in interpreting the text of such ordinances, will be helped by this discussion.

Residences

One-Family Detached Residences

In New York City there is only one kind of residence use district. Consequently a one-family detached or attached residence, a two-family detached or attached residence, or a multi-family house may be erected in any residence district. The area regulations, however, by prescribing dimensions of yards and fixing a percentage for lot coverage cause a segregation of open-development types like one-family and two-family detached residences. The framers of the building zone resolution considered that the courts might not recognize a difference so far as health and safety were concerned between a detached one-family house and a detached two-family house. It was feared that the courts might declare that a two-family house on a large lot was as safe and as healthful as a one-family house on a small lot.[1] This precaution was generally observed in the eastern part of this country. Early pressure for one-family detached-residence districts was strong in the west and on the Pacific coast. The courts after the Euclid decision were so inclined to uphold zoning that minor distinctions were swept aside. One-family detached-residence districts are now commonly employed.[2] They are considered a subdivision of the

[1] Vernon v. Mayor & Council of Westfield, 98 N. J. L. 600, 124 A. 248 (1923)

[2] Cal.—Blumenthal & Co. v. Cryer, 71 Cal. A. 668, 236 P. 216 (1925)
Miller v. Board of Public Works of Los Angeles, 195 Cal. 477, 234 P. 381 (1925)
Colo.—Spiegleman v. Williams, District Court, Denver, May 6, 1929

Footnote continued on page 193.

field of use regulation, and are upheld because by and large they conserve open-development localities.

Two-Family Detached Residences

These are detached houses generally arranged for two families, one above the other. In an ordinance recognizing more than one kind of one-family detached-residence districts, differing from one another in respect to required yard dimensions, it is considered imprudent to fix smaller required yards for a two-family detached-residence district than are fixed for the lowest one-family detached-house district. Where a limitation of number of families per acre, or a required number of square feet per family is imposed, a one-family detached house should not be required to have a larger lot than a two-family detached house in the same district.[1]

One-Family Semi-Detached Residences

These are commonly built in pairs, a party wall separating each residence from the other. The rule should be one main building to a lot. Therefore it is not good practice to provide that two such houses can be built on one lot. As there are two main houses there should be two lots. The ordinance should require one side yard for each house.

Two Family Semi-Detached Residences

These are commonly two distinct houses separated by a party wall, each arranged for two families, one above the other. The ordinance should require one side yard for each house.

Footnote continued from page 192.

Ill.—Bjork v. Safford, 333 Ill. 355, 164 N. E. 699 (1928)
Village of Riverside v. Reagan, 270 Ill. A. 355 (1933)
Village of Western Springs v. Bernhagen, 326 Ill. 100, 156 N. E. 753 (1927)
Mass.—Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269 (1924)
N. J.—Handy v. Village of South Orange, 118 A. 838 (1922)
Kitay v. Quigley, 6 N. J. Misc. 623, 142 A. 427 (1928)
Vernon v. Mayor & Council of Westfield, 98 N. J. L. 600, 124 A. 248 (1923)
N. Y.—Reilly v. Carteright, Supreme Court, Westchester County, New York Law Journal, April 10, 1935

[1] Merrill v. City of Wheaton, 356 Ill. 457, 190 N. E. 918 (1934)

One-Family Attached Residences

These are sometimes called row houses and sometimes block houses.[1] Each is commonly separated from the next house on either side by a party wall. The ordinance will not require any side yard.

Two-Family Attached Residences

These are attached houses arranged for two families, usually one above the other, each house being separated from the next one on either side by a party wall. The ordinance will not require any side yard.

Group Residence Units

In a residence district it is sometimes desired to allow a group of one-family units, some of which shall be separated by unpierced walls, the end units having side yards. It is improper to call this arrangement "community dwellings" because if each unit is a separate dwelling, some will have side yards and some will have none. It is not only difficult to make provision for such yards in the ordinance, but if it is made it violates the statutory requirement of uniformity within a district. An existing definition declares that a "group dwelling is a building consisting of a series of noncommunicating one-family sections having a common wall between each two adjacent sections."

Multi-Family Houses

The practice is almost universal for municipalities to call a residence for more than two families a multi-family house. It is usually allowed in the densest residence district. In New York City it is allowed in every height, area, and use district. In some area districts in that city a large lot would be required, and it is therefore usually unprofitable to build. Experience has shown that the useful life of a multi-family house is increased if it occupies less than 50 percent of the lot. Dark rooms should be prevented by the zoning regulations. Multi-family houses may lawfully be

[1] Westchester Housing Corp. v. Bunnell, 130 Misc. 586, 224 N. Y. S. 326, 131 Misc. 251, 227 N. Y. S. 358 (1927)

excluded from open development districts.[1] Many municipalities consider that home ownership is encouraged by the prevention of such houses.

Other Buildings and Uses

Boarding Houses

A boarding house has for its main use the taking and care of boarders. It is allowed in every residence district in New York City. Many municipalities exclude it from residence districts having the largest yards and permit it in multi-family house districts.[2] Some exclude it from every residence district on the ground that it is conducting a business. Taking boarders should be considered a proper accessory use in a residence district where the main use of the house is its occupation by the family of the person taking the boarders. In such a case there should be no display sign. It should not be called a restaurant, for conducting a restaurant is a main use and is a business.

Rooming Houses

A rooming house has for its main use the taking and care of roomers. A rooming house is more generally excluded from residence districts than a boarding house. Roomers may be taken in a private home, however, so long as the practice is incidental to the main use of the house.

If the ordinance does not allow a rooming house in a residence district, it will be prohibited as a business.[3]

[1] Ind.—Dollman v. Osbon, Marion Circuit Court, Indianapolis, May 3, 1928
Mass.—Bianchi v. Commissioner of Public Buildings of Somerville, 279 Mass. 136, 181 N. E. 120 (1932)
N. Y.—Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N. Y. S. 178, affd. 261 N. Y. 506, 185 N. E. 714 (1933)
Ohio—Dantzig v. Durant, 21 Ohio Law Reporter 395 (1923)
Koch v. City of Toledo, 37 F. (2d) 336 (1930)
Morris v. East Cleveland, 22 Ohio N. P. (N S.) 549, 31 Ohio Dec. 98, 197 (1920)
Okl.—De Lano v. City of Tulsa, 26 F. (2d) 640 (1928)

[2] Conn.—Osborn v. Town of Darien, 119 Conn. 182, 175 A. 578 (1934)
N. J.—Downs v. Borough of Sea Bright, 12 N. J. Misc. 11, 169 A. 342 (1933)
N. Y.—Phillips v. Batista, City Court, New Rochelle, July 11, 1930

[3] Hicks v. Stoermer, Supreme Court, Kings County, N. Y., New York Law Journal, December 29, 1928

Hotels

A hotel in zoning regulations is not synonymous with a common law inn. It may be what we call a family hotel or an apartment hotel. In New York City a hotel having thirty or more sleeping rooms is allowed in all residence districts. In many municipalities hotels are excluded from residence districts having the largest required yards, and are permitted in multi-family house districts and business districts. The tendency to force hotels into multi-family house districts and business districts is open to objection.[1] Travelers should be furnished with a quiet place to sleep if they want it. The attractiveness of many municipalities would be increased if a hotel could be built on a quiet street. It would be lawful to require larger yards than residences.

Schools

The building zone resolution of New York City allows schools, whether public or private, in every residence district. A few municipalities have endeavored to exclude them from residence districts having the largest required yards. It would seem unreasonable to force schools into business districts where there is noise and congestion and where land is most expensive. To force them into the more congested residence districts is equally unreasonable. Zoning ought not to be employed to free the highest-class residence district from every use that may be considered objectionable. The children of such a district should properly go to school in that district. The police power should not be invoked to deflect them into a neighborhood of smaller homes.[2] A zoning ordinance cannot take away from a municipality its right to locate a public building where it is needed. Nevertheless, if a municipality makes zoning regulations, it ought in fairness to observe them in its own new buildings. A private school operated for gain, being a form of business, can be excluded lawfully from residential districts by a specific provision to that effect in the ordinance. On the other hand, it would seem unreasonable to exclude a private school not

[1] Bennett v. Inspector of Buildings of Cambridge, 270 Mass. 436, 170 N. E. 412 (1930)

[2] D. C.—Commissioners of District of Columbia v. Shannon & Luchs Const. Co., 57 App. D. C. 67, 17 F. (2d) 219 (1927)
Ore.—Roman Catholic Archbishop v. Baker, 140 Ore. 600, 15 P. (2d) 391 (1932)

conducted for gain. Such a school would be within the class of churches, hospitals, and other institutions not conducted for gain, and usually exempted from taxation. Landowners near schools often petition to have their locality changed from residence to business so that they can build stores near the school. It is a mistake to make the change. Schools should so far as possible be somewhat removed from stores and heavy traffic.[1] Larger yards may lawfully be required for a school than for residences.

Dormitories

A dormitory ought to be allowed as a matter of right in every residence district where a private school is allowed. A dormitory is not a school building. Neither is it a club or fraternity house. Therefore it is prudent to specify it in the ordinance.[2] It is lawful to require larger yards than for residences.

Fraternity Houses

Where the ordinance does not specifically exclude a fraternity house from a residence district, it will usually be permitted.[3] This is true even in a one-family detached-house residential district. A fraternity is often included in the definition of family. A fraternity house may, however, be specifically excluded from a one-family detached-house district on the ground that it has features that are harmful in such districts.

Libraries

New York City allows a library in residence districts of every type, without specifying whether it is a public or private library. Consequently in that city a private circulating library conducted

[1] Commissioners of District of Columbia v. Shannon & Luchs Const. Co., *ante*

[2] Western Theological Seminary v. City of Evanston, 325 Ill. 511, 156 N. E. 778, 331 Ill. 257, 162 N. E. 863 (1928)

[3] Neb.—City of Lincoln v. Logan-Jones, 120 Neb. 827, 235 N. W. 583 (1931)
Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835 (1927)
N. Y.—City of Syracuse v. Snow, 123 Misc. 568, 205 N. Y. S. 785 (1924)
Pa.—Appeal of Thompson, Court of Common Pleas, Allegheny County, October Term, 1925, and June 29, 1926

for gain could be operated in a residence district. It is customary in all states to provide for libraries in this manner.

Clubs

The usual words used to permit clubs in residence districts are "clubs excepting clubs the chief activity of which is a service customarily carried on as a business." Although a club in a small municipality is usually unobjectionable in residence districts, it becomes a serious problem in large cities. When a business such as a restaurant, night club, concert hall, or bathing beach, seeks to invade a residence district, it usually does so in the guise of a club. The word club is extremely comprehensive. A singing club with its accompaniments may be far more objectionable in a residence district than a retail store.[1]

Community Houses

Small municipalities, especially in the suburbs, often feel the need of a meeting place where lectures and amateur plays can be given, where citizens' organizations can meet, and where public meetings on occasions can be held. It is not a club house. Experience has shown that it is best located in a residence district. It ought to have the advantage of quiet surroundings.

Hospitals

No use provided for in zoning ordinances has undergone more vicissitudes than the non-profit operation of hospitals. These institutions have been founded to conserve the health of human beings and yet communities seek to exclude them from residence districts and even business districts on the ground that they are injurious to the health and safety of the community. Although the sick need sunshine and quiet some officials would force hospitals into industrial districts. Sometimes municipalities exclude them

[1] N. Y.—McCarter v. Beckwith, 247 App. Div. 289, 285 N. Y. S. 151, affd. 272 N. Y. 488, 3 N. E. (2d) 882 (1936)
Neuschaefer v. Apawamis Beach Corp., Supreme Court, Westchester County, New York Law Journal, July 31, 1934
City of New Rochelle v. Beckwith, City Court, New Rochelle, Westchester Law Journal, August 18, 1933, 268 N. Y. 315, 197 N. E. 295 (1935)
Sharp v. Dalton, Supreme Court, Kings County, New York Law Journal, March 1, 1928, 224 App. Div. 663, 228 N. Y. S. 899 (1928)

from all residence districts and sometimes only from the most open ones. They should be allowed as a matter of right in the sunniest and most healthful localities. Ample grounds can be required by the ordinance. Inasmuch as a hospital is in a different class of buildings from residences, the rule of uniformity within a district does not demand the same yard requirements for both. Every state should establish a department having power after a public hearing to fix the location of hospitals not operated for gain. It is probably unreasonable for a zoning ordinance to exclude such institutions from all districts.[1] However, the courts upheld the exclusion of a mental health hospital from a village in New York.[2] A hospital conducted for gain and not authorized by a state certificate can be specifically excluded from a residence district on the ground that it is a business.

Hospitals are also discussed in Chapter IV, under Humanitarian Institutions.

Sanitariums

The building zone resolution of New York City allows a sanitarium in any residence district. A sanitarium differs from a hospital in that it is frequently conducted for gain whereas hospitals are usually public or else not conducted for gain. It is probably lawful for the ordinance to exclude a sanitarium conducted for gain from a residence district on the ground that it is a form of business. The question arises, however, whether it is wise to do this. A sanitarium should be in one of the most open and least congested localities. Larger surrounding yards can be lawfully required than for a residence in the same district.

Asylums or Homes

The word "asylum" is a generic term, covering a retreat for orphans, old people, or incurables. It is a term which for obvious

[1] Cal.—Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225 (1926)
Jones v. City of Los Angeles, 286 P. 161, 211 Cal. 304, 295 P. 14 (1930)
San Diego Tuberculosis Ass'n v. City of East San Diego, 186 Cal. 252, 200 P. 393 (1921)
Del.—Mayor and Council of Wilmington v. Turk, 14 Del. Ch. 392, 129 A. 512 (1925)

[2] Jewish Mental Health Society v. Village of Hastings, 268 N. Y. 458, 198 N. E. 30, 56 S. Ct. 592 (1936)

reasons is gradually giving way to the less objectionable term "Home." Such an institution is usually public or else not conducted for gain. It cannot properly be excluded from any zoning district.[1] It would seem unreasonable to force it into a business district where there is noise and where land values are high. It is equally unreasonable to force it into a congested or closely built residence district. Larger yards can lawfully be required than for a residence in the same district. If the institution is operated for profit it may be specifically excluded from a residence district.[2]

Institutions of this type are also discussed in Chapter IV, under Humanitarian Institutions.

Churches

Practically all zoning ordinances allow churches in all residence districts.[3] It would be unreasonable to force them into business districts where there is noise and where land values are high, or into dense residence districts (in cities which have established several kinds of such districts). Some people claim that the numerous churchgoers crowd the street, that their automobiles line the curbs, and that the music and preaching disturb the neighbors. Communities that are too sensitive to welcome churches should protect themselves by private restrictions.

Greenhouses

A greenhouse is always allowable in a residence district as an accessory building or use. The question sometimes arises whether it is necessary to allow it as a main building in such a district.[4]

[1] U. S.—Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 (Wash., 1928)
Mo.—Women's Kansas City St. Andrews Soc. v. Kansas City, 58 F. (2d) 593 (1932)
N. Y.—Mineola Home for Cardiac Children v. Village of Irvington, Supreme Court, Westchester County, January 3, 1925
City of Rochester v. Rochester Girls' Home, 194 N. Y. S. 236 (1922)

[2] City of Yonkers v. Horowitz, 222 App. Div. 297, 226 N. Y. S. 252 (1928)

[3] Ill.—Phelps v. Board of Appeals of Chicago, 325 Ill. 625, 156 N. E. 826 (1927)
Ore.—Kroner v. City of Portland, 116 Ore. 141, 240 P. 536 (1925)
W. Va.—Howell v. Meador, 109 W. Va. 368, 154 S. E. 876 (1930)

[4] Iowa—Call Bond & Mortgage Co. v. Sioux City, 219 Iowa 572, 259 N. W. 33 (1935)
N. J.—De Vito v. Pearsall, 115 N. J. L. 323, 180 A. 202 (1935)
N. Y.—Jewell v. Murphy, 224 App. Div. 763, 229 N. Y. S. 754 (1928)

The criticism is made that when a greenhouse is a main building it is nearly always conducted as a business. Frequently, however, it is a main building, standing on its own lot, and although used for the commercial production of flowers and plants it is not a place of merchandising. It needs to be in an open sunny locality. Forcing it into a business district is usually tantamount to prohibition. New York City has always allowed it in all residence districts. Some municipalities have allowed it in residence districts with a proviso that there should be no display signs and no sales at retail on the premises.

Stores

A store is always excluded from a residence district. Attempts have been made to distinguish between wholesale and retail stores, but probably wholesale stores cannot lawfully be segregated from retail stores by zoning. It is difficult if not impossible to show the courts that one sort is different from the other in its relation to the health and safety of the community. Vehicular street traffic connected with a large retail department store is as burdensome as that of any wholesale store. The retail zoning district in New York City is a misnomer, for the district is available for wholesale and retail stores equally. It was chosen as a name in contradistinction to light industry. A better name would have been merchandising district. If a store is permitted in a business district, the kind of merchandising can be changed without obtaining a new consent or permit from the municipality. For instance, it may be rented for a grocery store and later for a dry goods store. This is not a change of use. However, boards of appeals in making variances often impose as a condition the prohibition of certain more objectionable forms of merchandising, such as the sale of delicatessen or fish.

Office Buildings

Offices are not as objectionable in a residence district as stores. Goods are sold in stores but not in offices. On this account municipalities are often tempted to allow an office building in a residence district. An early board of appeals in New York City made the mistake of passing a rule that an office building for architects or

doctors could be built in a residence district. The rule was abandoned after a short period. Hartford has allowed large life insurance buildings in residence districts but has required large yards. Public utility buildings like telephone exchanges tend to become office buildings by increasing office uses. National fraternal organizations sometimes erect club houses in residence districts and gradually use them for office purposes. The danger in allowing these business uses in residence districts is that a neighboring landowner will claim the right to use his land for business also. The courts may support his claim that the refusal of a permit is discriminatory. Boards of appeals in making variances for a building which is to serve as a buffer between residence and business districts can impose a condition that the building shall be used for offices on the first floor and residences above. This method is commendable in certain border-line cases.

Personal Service Shops

It is discriminatory to exclude personal service shops from business districts. They are no more objectionable than stores. Ordinances sometimes enumerate barber shops, beauty parlors, valets, and shoe polishing stands as allowable in business districts. It is better to use the designation "personal service shop" because in an enumeration some necessary and proper shop may be omitted.

Laundries

From the beginning of zoning the laundry has been a troublesome kind of use for municipalities to control.[1] It can assume many forms—the laundry package delivery office, the small hand laundry, and the large machine laundry. The delivery office is usually allowed in every business district, and the machine laundry in every industrial district, being excluded, however, from a business district. The small hand laundry always seeks a place in a business district and its neighbors often try to relegate it to an industrial district. Some municipalities have allowed it in a business district if not more than a specified small number of workers are employed.

Before modern zoning was established several laundry cases

[1] Williams v. Blue Bird Laundry Co., 85 Cal. A. 388, 259 P. 484 (1927)

arose in California.[1] The opinions in these cases assisted in the framing of later laws.

Storage Warehouses

In most large cities a storage warehouse is allowed in business districts. Small cities frequently try to exclude it. The reasons usually given for exclusion are the frequency of trucks, and the unused character of the frontage which makes a dead spot on a business street and indirectly affects its attractiveness at that point. As a matter of fact a warehouse does not cause greater frequency of trucks than a store. The exclusion is mainly because of the creation of a dead spot. Although a storage warehouse may affect attractiveness and land value it is difficult to see how it can affect the community health, safety, comfort, and general welfare more injuriously than a store. It would seem to be discriminatory to exclude a storage warehouse from any business district. Out-of-doors storage is usually prohibited in residence districts. The nature of the goods stored in business districts has been discussed by courts.[2]

Lumber Yards

In many municipalities a lumber yard is excluded from business districts. In the original building zone resolution of New York City it was allowed in such districts. Later an amendment excluding it was urged by merchants who claimed that it introduced a fire risk. They failed to prove, however, that the risk was greater than in the case of a store. The real reason was probably the impression of merchants and landowners that an undesirable neighbor could be excluded by zoning. It is difficult to see how a lumber yard harms the health or safety of the community more than a store.[3] This statement does not refer to a planing mill or to wood-

[1] U. S.—Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357 (Cal., 1885)
Cal.—Ex parte Quong Wo, 161 Cal. 220, 118 P. 714 (1911)
Sam Kee v. Wilde, 41 Cal. A. 528, 183 P. 164 (1919)

[2] N. J.—Adelmann v. Williams, 10 N. J. Misc. 324, 159 A. 148 (1932)
N. Y.—Matter of Meadowmere Ass'n, Inc., Supreme Court Nassau County, New York Law Journal, August 17, 1932
Ohio—City Ice & Fuel Co. v. Stegner, 120 Oh. St. 418, 166 N. E. 226 (1929)
Pa.—Kiddy's Appeal, 294 Pa. 209, 143 A. 909 (1928)

[3] Cal.—Magruder v. Redwood City, 203 Cal. 665, 265 P. 806 (1928)
N. J.—Durkin Lumber Co. v. Fitzsimmons, 106 N. J. L. 183, 147 A. 555 (1929)
N. C.—Turner v. City of New Bern, 187 N. C. 541, 122 S. E. 469 (1924)

working machinery which may be connected with the lumber yard. If the lumber yard is conducted as an industry it should be excluded from a business district. Exceptional situations have come before the courts.[1]

Coal Yards

Coal yards were permitted in business districts in the building zone resolution of New York City. At the same time that efforts were made to exclude lumber yards from such districts an amendment was introduced to exclude coal yards and coal pockets. It was shown that there are features of dust and noise that differentiate a lumber yard from a coal yard. On this account the amendment excluding coal yards was passed. Throughout the country such exclusion is customary.[2]

Stables

An accessory stable for not more than a specified number of horses is usually permitted in a residence district. A large stable as a main building is usually permitted only in an industrial district.[3]

Garages

The increasing need for garages in modern times was undoubtedly one reason for the rapid spread of use zoning. Before the adoption of zoning every residence and business locality was wide open to invasion by the public garage. Sometimes an entire block of houses was made undesirable by the advent of a single large garage. Zoning ordinances have been especially helpful in this matter. The accessory private garage is always permitted in residence districts.[4] In New York City it formerly could not accommodate more than

[1] Gilfillan's Permit, 291 Pa. 358, 140 A. 136 (1927)

[2] Mass.—Cochran v. Roemer, 287 Mass. 500, 192 N. E. 58 (1934)
Okl.—Oklahoma City v. Dolese, 48 F. (2d) 734 (1931)

[3] Cal.—Boyd v. City of Sierra Madre, 41 Cal. A. 520, 183 P. 230 (1919)
Parker v. Colburn, 196 Cal. 169, 236 P. 921 (1925)
Ryan v. Andriano, 91 Cal. A. 136, 266 P. 831 (1928)
Ill.—Gammon Co. v. Standard Trust & Savings Bank, 327 Ill. 489, 158 N. E. 810 (1927)
Md.—Ehrhardt v. Board of Zoning Appeals, City Court, Baltimore, Baltimore Daily Record, October 29, 1924

[4] N. J.—Allen v. City of Paterson, 98 N. J. L. 661, 121 A. 610, 99 N. J. L. 532, 124 A. 924 (1924)
Belasco v. Mayor, etc., of Jersey City, 6 N. J. Misc. 1088, 143 A. 820 (1928)

Footnote continued on page 205.

five cars. Experience showed that this number should have been three with the privilege of renting space for one car. This change has now been made. In New York City a garage for more than five cars may be built as a matter of right in an unrestricted district and nowhere else. Provision is made in the resolution, however, that the Board of Appeals may permit a garage for more than five cars in a business district if on the same street between two intersecting streets there was a garage for more than five cars when the building zone resolution went into effect in 1916, and in either a residence or business district if the acknowledged consents of the owners of 80 percent of the frontage affected are filed with the Board of Appeals.[1] In either case the Board of Appeals must hold a hearing and approve or disapprove. The result of the first rule has been that in business districts garages have tended to locate in groups, leaving the business street as a whole free from the sporadic garage. The result of the second rule has been to allow hidden garages or garages set well back from the street in residence districts, especially apartment house districts, where nearby storage of private cars is necessary.

The needs of different municipalities have been shown by their different regulations. Some allow a garage in all business districts.[2]

Footnote continued from page 204.

Klein v. Mayor and Aldermen of Jersey City, 4 N. J. Misc. 277, 132 A. 502 (1926)

Northern New Jersey Oil Co. v. Board of Adjustment of Newark, 6 N. J. Misc. 698, 142 A. 557 (1928)

Pa.—Appeal of Loux, Court of Common Pleas, Northampton County, October 3, 1927

Tex.—Woods v. Kiersky, 297 S. W. 518, 14 S. W. (2d) 825 (1929)

Wis.—Sentinel-News Co. v. City of Milwaukee, 212 Wis. 618, 250 N. W. 511 (1933)

[1] N. Y.—Ammanna v. Walsh, 136 Misc. 653, 241 N. Y. S. 252 (1930)

Cotton v. Leo, 110 Misc. 519, 180 N. Y. S. 554, 194 App. Div. 921, 184 N. Y. S. 943 (1920)

Donegan v. Walsh, Supreme Court, Bronx County, New York Law Journal, September 20, 1929

Hacker v. Board of Appeals of Buffalo, 223 App. Div. 196, 227 N. Y. S. 627 (1928)

Smith v. Walsh, 211 App. Div. 205, 207 N. Y. S. 324, 240 N. Y. 606, 148 N. E. 724 (1925)

Spinelli v. Walsh, 229 App. Div. 745, 241 N. Y. S. 459, affd. 254 N. Y. 601, 173 N. E. 884 (1930)

[2] Ill.—State Bank & Trust Co. v. Village of Wilmette, 358 Ill. 311, 193 N. E. 131 (1934)

N. J.—Dickinson v. Inhabitants of Plainfield, 13 N. J. Misc. 260, 176 A. 716, 116 N. J. L. 336, 184 A. 195 (1936)

Some apply the name minor garage to a one-story structure in which repairs are forbidden and which is allowed in business districts. Some have employed methods of using the board of appeals. Open-air parking spaces have been carefully provided for.

The sale of new cars can be carried on in all business districts. Such a store is not a garage.[1] The keeping of second-hand dead cars for sale in business districts has been prohibited in some ordinances but this prohibition would seem to be of doubtful validity.

The usual garage is also a repair shop, and as a form of industry it can reasonably be excluded from a business district. The garage proper is merely a covered storage place for cars. New York City has always distinguished between these two uses and has not allowed a garage to become a repair shop as a matter of right.

The New York City building zone resolution provided that in any district a public garage should not be permitted within two hundred feet of a school or hospital. This regulation is illogical because it is the same for all districts whereas all the other regulations of the ordinance vary for the several districts. This one should have been part of the building code for a regulation which operates uniformly throughout the city should not be placed in a zoning ordinance. But inasmuch as it depends on the police power, and can be enforced the same as the other regulations, the courts have found no fault with it. Other cities have copied it, applying it to gasoline stations as well as garages, and many courts have passed favorably upon it.[2] Sometimes it has been used to protect churches and theatres against nearby garages and filling stations.

[1] Appeal of Alpern, 291 Pa. 150, 139 A. 740 (1927)

[2] Ill.—Deitenbeck v. Village of Oak Park, 331 Ill. 406, 163 N. E. 445 (1928)
Troy v. Village of Forest Park, 318 Ill. 340, 149 N. E. 281 (1925)
Ind.—In re White, 95 Ind. A. 579, 180 N. E. 873 (1932)
Ky.—Cayce v. City of Hopkinsville, 217 Ky. 135, 289 S. W. 223 (1926)
N. J.—Bauer v. Board of Fire & Police Com'rs of Paterson, 102 N. J. L. 235, 132 A. 515 (1926)
Eggie v. Board of Com'rs of Audubon, 6 N. J. Misc. 1094, 143 A. 747 (1928)
Hartman v. Bigelow, 5 N. J. Misc. 227, 136 A. 201 (1927)
Interstate Oil Co. v. City of Orange, 11 N. J. Misc. 89, 165 A. 99 (1933)
Johnston v. Hague, 2 N. J. Misc. 77, 136 A. 407 (1924)
M. & G. Construction Co. v. Board of Commissioners of Jersey City, 4 N. J. Misc. 864, 134 A. 776 (1926)
Newark Athletic Club v. Board of Adjustment of Newark, 6 N. J. Misc. 528, 142 A. 923 (1928), 7 N. J. Misc. 55, 144 A. 167 (1929)

Footnote continued on page 207.

An accessory garage for a small number of cars, usually three, should not be permitted in a residence district unless the main building, ordinarily a home, is already erected or will be erected simultaneously. Such a garage is not accessory unless there is a main building to which it is accessory.[1]

A permit is required in most cities to make a curb cut for a garage entrance. Curb-cut permits can doubtless be denied in the discretion of the official having authority, but it has been held that the cutting of the curb is not in itself a violation of a zoning ordinance.[2] It is a mistake for a city to expect to enforce zoning regulations by refusing curb-cut permits.[3] Limitation on curb cuts will not control the application of the zoning regulation.

Footnote continued from page 206.

Oster v. Mayor and Common Council of Westwood, 13 N. J. Misc. 771, 180 A. 556 (1935)
Savitz-Denbigh Co. v. Bigelow, 4 N. J. Misc. 819, 134 A. 557, 5 N. J. Misc. 533, 137 A. 439, 104 N. J. L. 445, 140 A. 921 (1928)
Wittkop v. Garner, 4 N. J. Misc. 234, 132 A. 339 (1926)
N. Y.—Ain v. Fairchild, Supreme Court, Nassau County, New York Law Journal, July 21, 1932
Boyd v. Walsh, 217 App. Div. 461, 216 N. Y. S. 242, affd. 244 N. Y. 512, 155 N. E. 877 (1926)
Castellano v. Walsh, Supreme Court, Kings County, New York Law Journal, June 7, 1921
Daleson Realty Corp. v. Walsh, Supreme Court, Kings County, New York Law Journal, September 16, 1929
David Holding Corp. v. Murdock, 150 Misc. 697, 271 N. Y. S. 177, affd. 264 N. Y. 609, 191 N. E. 588 (1934)
Drazan v. Moore, Supreme Court, Kings County, New York Law Journal, January 13, 1925
Edlar Realty Corp. v. Walsh, Supreme Court, New York County, New York Law Journal, July 8, 1930
Sondern v. Walsh, 108 Misc. 193, 196, 178 N. Y. S. 192, 194 (1919)
Webkan Holding Corp. v. Walsh, 230 App. Div. 717, 243 N. Y. S. 770 (1929)
N. C.—Burden v. Town of Ahoskie, 198 N. C. 92, 150 S. E. 808 (1929)

[1] N. Y.—Benedict v. Milleman, 128 Misc. 367, 218 N. Y. S. 256 (1926)
Pa.—Appeal of Loux, Court of Common Pleas, Northampton County, October 3, 1927

[2] N. Y.—Cedar Ave. Realty Co. v. Flynn, Supreme Court, Bronx County, New York Law Journal, February 24, 1933
Monument Garage Corp. v. Levy, 149 Misc. 791, 268 N. Y. S. 213, 266 N. Y. 339, 194 N. E. 848 (1935)

[3] N. Y.—Borgeaud v. Fassler, 153 Misc. 546, 274 N. Y. S. 599 (1934)
Empire State Lines v. Levy, Supreme Court, New York County, New York Law Journal, October 1, 1935
Ganbarg v. Fassler, Supreme Court, New York County, New York Law Journal, August 12, 1935
Monument Garage Corp. v. Levy, 149 Misc. 791, 268 N. Y. S. 213, 266 N. Y. 339, 194 N. E. 848 (1935)
Smith v. Levy, 264 N. Y. 575, 191 N. E. 571 (1934)

Groups of small garages, of a size permissible as main buildings in a business district, are tantamount to a single prohibited public garage. These were called garage villages in New York City.[1] They have now been brought under control by amendments to the building zone resolution.

Open-air parking places are virtually open-air garages and should be subject to the same regulation as garages.[2] To treat them otherwise is to place an unfair handicap on garage buildings. In New York City open-air parking places became prevalent where obsolete business structures were torn down. The building zone resolution has recently been amended to put such parking places on the same basis as garages.[3] The subject of curb-cut permits was analyzed by courts in connection with the establishment of open-air parking places.[4]

It is discriminatory for a town council to allow some garage permits and not others.[5]

A garage is not a nuisance *per se*.[6]

[1] Conn.—Blake v. Board of Appeals of Hartford, 117 Conn. 527, 169 A. 195 (1933)
N. Y.—Ashley v. Walsh, 213 App. Div. 155, 210 N. Y. S. 178, 241 N. Y. 527, 150 N. E. 540 (1925)
Lourose Realty Corp. v. Putnam, Supreme Court, Kings County, New York Law Journal, December 7, 1923
Multiplex Garages, Inc. v. Walsh, Supreme Court, Bronx County, New York Law Journal, June 28, 1924, 213 App. Div. 155, 210 N. Y. S. 178, 241 N. Y. 527, 150 N. E. 540 (1925)

[2] Conn.—St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343 (1931)
N. Y.—Best & Co. v. Incorporated Village of Garden City, 247 App. Div. 893 (1936)
Monument Garage Corp. v. Levy, 266 N. Y. 339, 194 N. E. 848 (1935)
City of Mt. Vernon v. Travis Realty Corp., Supreme Court, Westchester County, New York Law Journal, March 4, 1935, affd. 246 App. Div. 727, 284 N. Y. S. 1015 (1935)
Seidman v. Tilrose Camp Operating Co., 153 Misc. 510, 274 N. Y. S. 606 (1932)

[3] People v. Wolfe, Magistrates' Court, Borough of The Bronx, N. Y., New York Law Journal, January 30, 1936, affd. 248 App. Div. 721 (1936)

[4] N. Y.—Cameron v. Murdock, Supreme Court, Kings County, New York Law Journal, July 3, 1936
Empire State Lines v. Levy, Supreme Court, New York County, New York Law Journal, October 1, 1935
Weil v. Reveille, Supreme Court, Bronx County, New York Law Journal, July 7, 1936

[5] N. J.—Keavey v. Randall, 1 N. J. Misc. 311, 122 A. 379 (1923)
N. Y.—Hoffer v. Schwab, 126 Misc. 289, 213 N. Y. S. 659 (1926)

[6] Mass.—Polish Political Club v. Cloper, 260 Mass. 559, 157 N. E. 705 (1927)
N. Y.—Rotterdam Holding Co. v. Hunt's Point Garage Co., Supreme Court, Bronx County, New York Law Journal, December 22, 1916

Gasoline Filling Stations

In most municipalities a gasoline filling station is allowed only in industrial districts as a matter of right.[1] The board of appeals is often given discretionary power to permit it as a variance in business districts.[2] The principles of zoning are not adapted to compel the distribution of stations at proper intervals. However beneficial this proper distribution would be, specific regulations in

[1] Ala.—Bloch v. McCown, 223 Ala. 348, 135 S. 633 (1931)
Leary v. Adams, 226 Ala. 472, 147 S. 391 (1933)
Fla.—Aiken v. E. B. Davis, Inc., 106 Fla. 675, 143 S. 658 (1932)
Ga.—Reynolds v. Brosnan, 170 Ga. 773, 154 S. E. 264 (1930)
Iowa—Marquis v. City of Waterloo, 210 Iowa 439, 228 N. W. 870 (1930)
Kan.—Simmonds v. Meyn, 134 Kan. 419, 7 P. (2d) 506 (1932)
Ky.—Cayce v. City of Hopkinsville, 217 Ky. 135, 289 S. W. 223 (1926)
La.—Giangrosso v. City of New Orleans, 159 La. 1016, 106 S. 549 (1925)
Manhein v. Harrison, 164 La. 564, 114 S. 159 (1927)
Me.—Millett v. Hayes & Co., 132 Me. 12, 164 A. 741 (1933)
N. J.—Keller v. Board of Com'rs of Irvington, 7 N. J. Misc. 977, 147 A. 646 (1929)
N. Y.—McNamara v. Bayly, Supreme Court, Westchester County, New York Law Journal, September 19, 1934
Ward v. Murdock, Supreme Court, Kings County, New York Law Journal, May 25, 1935, 247 App. Div. 808, 286 N. Y. S. 280 (1936)
Young Women's Hebrew Association v. Board of Standards and Appeals, 266 N. Y. 270, 194 N. E. 751, 296 U. S. 537, 56 S. Ct. 109 (1935)
Tex.—Lombardo v. City of Dallas, 47 S. W. (2d) 495 (1932), 124 Tex. 1, 73 S. W. (2d) 475 (1934)
Scott v. Champion Bldg. Co., 28 S. W. (2d) 178 (1930)
City of Texarkana v. Mabry, 94 S. W. (2d) 871 (1936)

[2] Colo.—Milton v. Azpell, District Court, City and County of Denver, July 2, 1925
Conn.—Lathrop v. Town of Norwich, 111 Conn. 616, 151 A. 183 (1930)
N. Y.—Baum v. Board of Standards and Appeals, Supreme Court, Kings County, New York Law Journal, April 19, 1935
Bribitzer v. Bevan, Supreme Court, Westchester County, New York Law Journal, December 2, 1935
Church & 94th St. Realty Corp. v. Murdock, Supreme Court, Kings County, New York Law Journal, May 2, 1933
Eckels v. Murdock, Supreme Court, Kings County, New York Law Journal, September 6, 1933, 242 App. Div. 690, 273 N. Y. S. 401, 265 N. Y. 545, 193 N. E. 313 (1934)
Finger v. Connell, Supreme Court, Bronx County, New York Law Journal, May 27, 1932
Garden Properties, Inc. v. Board of Appeals of New Rochelle, Supreme Court, Westchester County, Westchester Law Journal, October 11, 1933
Hegarty v. Murdock, Supreme Court, New York County, New York Law Journal, May 25, 1934
Jacob Morgenthaler Sons v. Murdock, Supreme Court, Queens County, New York Law Journal, May 16, 1935
Levy v. Board of Standards and Appeals, Supreme Court, Kings County, New York Law Journal, April 12, 1934, 243 App. Div. 609, 276 N. Y. S. 370, 267 N. Y. 347, 196 N. E. 284 (1935)

Footnote continued on page 210.

the ordinance are not a proper means for its accomplishment.[1] The refusal of a variance permit by a board of appeals, however, is sometimes based on the fact of oversupply. It is difficult to justify this because it involves discrimination. On the other hand, courts recognize a considerable degree of latitude in the exercise of discretion by a board of appeals. If stations are on three corners it would usually be unduly discriminatory for a board of appeals to exclude a station from the remaining corner. Undoubtedly the board can take into account the nearness and location of other stations. The exercise of its discretion is necessarily influenced by every element of the environment.[2]

Footnote continued from page 209.

Matter of Ruth Bond & Mortgage Co. Supreme Court, Kings County, New York Law Journal, May 2, 1933

Noviak Hldg. Corp. v. Murdock, Supreme Court, Queens County, New York Law Journal, August 15, 1934, 243 App. Div. 738, 278 N. Y. S. 118, 268 N. Y. 715, 198 N. E. 572 (1935)

Novick Holding Corp. v. Murdock, Supreme Court, Queens County, New York Law Journal, May 16, 1935, 246 App. Div. 745, 283 N. Y. S. 762 (1935)

128 32d St., B'klyn, Corp. v. Murdock, Supreme Court, Kings County, New York Law Journal, March 20 & March 28, 1934

Proc Bldg. Corp. v. Connell, Supreme Court, Kings County, New York Law Journal, March 11, 1933, 240 App. Div. 782, 266 N. Y. S. 903, affd. 264 N. Y. 513, 191 N. E. 541 (1934)

Rindfleisch v. Bayly, Supreme Court, Westchester County, Westchester Law Journal, August 9, 1933, 242 App. Div. 797, 275 N. Y. S. 657 (1934)

Ruth Bond & Mort. Co. v. Murdock, Supreme Court, Kings County, New York Law Journal, October 29, 1935

St. Albans-Springfield Corporation v. Connell, 257 N. Y. 73, 177 N. E. 313 (1931)

Okl.—Weaver v. Bishop, 174 Okl. 492, 52 P. (2d) 853 (1935)

Pa.—Franklin Street Methodist Episcopal Church v. Crystal Oil & Gas Co., 309 Pa. 357, 163 A. 910 (1932)

Walker v. Delaware County Trust Co., 314 Pa. 257, 171 A. 458 (1934)

Tex.—City of San Antonio v. Zogheib, 70 S. W. (2d) 333 (1934)

[1] Fischer v. Borough Council of South Toms River, 13 N. J. Misc. 852, 181 A. 630 (1935)

[2] N. J.—Hirschorn v. Castles, 113 N. J. L. 277, 174 A. 211 (1934)

N. Y.—Village of Babylon v. Freund, Supreme Court, Suffolk County, New York Law Journal, March 25, 1935

Bribitzer v. Bevan, Supreme Court, Westchester County, New York Law Journal, January 18, 1936

Cohen v. Murdock, Supreme Court, Queens County, New York Law Journal, May 11, 1935

Gilmont Corp. v. Rogers, Supreme Court, Westchester County, New York Law Journal, June 8, 1935

Scoland Bldg. Corp. v. Board of Standards & Appeals, Supreme Court, Kings County, New York Law Journal, January 27, 1934

Werner v. Walsh, 212 App. Div. 635, 209 N. Y. S. 454, affd. 240 N. Y. 689, 148 N. E. 760 (1925)

Many statements before made regarding garages, and also many of the court decisions cited, apply equally to gasoline stations.

A gasoline station needed in a park or parkway to supply pleasure cars is a lawful recreational use.[1]

Regulations preventing stations within a certain distance of schools and churches have usually been upheld.[2]

Restaurants

A restaurant is a business.[3] Constant efforts are made to invade residence districts with restaurants as a main use. A boarding house permitted in a residence district cannot lawfully exhibit an exterior sign marked restaurant. A club allowed in a residence district can operate what in common parlance is called a restaurant, but it must be incidental only. The club must not exhibit an exterior restaurant sign. This would be an invitation to the public to use the tables, and would cause the accessory use to come to an end. The restaurant would constitute a business and could be ousted on complaint of a neighbor.

Public Utility Buildings

This term includes railroad stations, transformer stations, power plants, water pumping plants, water towers, telephone exchanges, and similar buildings. The peculiarity of each of these is that the building as well as the site is affected with a public interest, and the site is often determined by the system of distribution. A water tower can be low if on a hill. A telephone exchange seeks the site of the wire center. The site of a railroad station is often fixed by matters of grade, track tangents, and accessibility. Each may properly be excluded from a residence district and some from a

[1] Village of Peekskill v. State Department, Supreme Court, Westchester County, N. Y., July, 1932

[2] Md.—Kramer v. Mayor and City Council of Baltimore, 166 Md. 324, 171 A. 70 (1934)
Pa.—Duty v. Vacuum Oil Co., 317 Pa. 15, 175 A. 522 (1934)
Wis.—Newman v. Pagels, 212 Wis. 475, 250 N. W. 430 (1933)

[3] Neb.—City of Lincoln v. Foss, 119 Neb. 666, 230 N. W. 592 (1930)
N. Y.—People v. Milray Corp., Municipal Term of Court of Special Sessions, Part I, July 11, 1928, affd. 225 App. Div. 860, 233 N. Y. S. 860 (1929)
Stockton Tea Room, Inc. v. Copeland, Supreme Court, New York County, New York Law Journal, April 19, 1922
Whitridge v. Park, 100 Misc. 367, 165 N. Y. S. 640, 179 App. Div. 884 (1917)

business district, but if such exclusion conflicts with public needs, the zoning regulation must give way. Boards of appeals have power to grant variance permits in proper cases and it is remarkable how uniformly throughout the country they have recognized public needs in this regard. The public utility building may be excluded from residence districts because it is a business or industry; ordinarily it should not be allowed in such districts as a matter of right. If it were allowed there the owners, with no public justification whatever for the invasion, might locate it where it would do great injury to the district. The only reason for the invasion might be that the utility company could save a few dollars by buying its lot in a residence district instead of in the business district. Practically all ordinances allow railroad passenger stations in residence districts. Some ordinances allow telephone exchanges in certain residence districts, if they are without office and industrial accessories.

In proper cases permits for nonconforming public utility buildings will be allowed as variances by boards of appeals. Sometimes the ordinance provides for the granting of the variance under an item of original jurisdiction, but where there is no such item in the ordinance the variance is sometimes granted under the provision of the enabling act for cases of practical difficulty and unnecessary hardship.[1]

Public Buildings

The municipality which ordains should be the first to obey its own ordinance. New York City has been scrupulous in doing this under the building zone resolution. In proper cases it has applied to the Board of Appeals for a variance permit. It amended the ordinance so that fire houses are now permissible in residence districts. While comity and fairness should prompt a municipality not to do in this regard what it forbids a private citizen from doing, yet no zoning ordinance can prevent the municipal, state, or federal government from erecting buildings in the form and on the site needed by the public.[2]

[1] Greenwich Gas Co. v. Zoning Board of Appeals of Greenwich, 113 Conn. 684, 155 A. 850 (1931)

[2] See discussion and cases at page 31.

Undertaking Establishments

Nearly every municipality before zoning had one or more mortuaries in buildings which had been private homes with ample grounds surrounded by residences. There was an appropriateness in such a location from the point of view of the owner and people attending funerals. The neighbors, however, objected. When zoning ordinances were adopted, new mortuaries were relegated to business districts. However inappropriate a crowded and noisy business district may be for funerals, there is no doubt that the mortuary is a business. Courts have said that the constant occurrence of funerals produces an atmosphere of depression in residence districts. This is especially the case with children, old people, and invalids. The courts have rather uniformly upheld the exclusion.[1]

[1] Ala.—White v. Luquire Funeral Home, 221 Ala. 440, 129 S. 84 (1930)
Ariz.—City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 P. 923 (1928)
Cal.—Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716 (1920)
Ex parte Ruppe, 80 Cal. A. 629, 252 P. 746 (1927)
Sapiro v. Frisbie, 93 Cal. A. 299, 270 P. 280 (1928)
Fla.—Skillman v. City of Miami, 101 Fla. 585, 134 S. 541 (1931)
Stephens v. City of Jacksonville, 103 Fla. 177, 137 S. 149 (1931)
Ga.—McCord v. Ed Bond & Condon Co., 175 Ga. 667, 165 S. E. 590 (1932)
Ind.—Albright v. Crim, 97 Ind. A. 388, 185 N. E. 304 (1933)
Iowa—Kirk v. Mabis, 215 Iowa 769, 246 N. W. 759 (1933)
Kan.—Fink v. Smith, 140 Kan. 345, 36 P. (2d) 976 (1934)
La.—Bultman Mortuary Service v. City of New Orleans, 174 La. 360, 140 S. 503 (1932)
Md.—Cook v. Howard, 155 Md. 7, 141 A. 340 (1928)
Jack Lewis, Inc. v. Mayor and City Council of Baltimore, City Court, Baltimore Daily Record, June 25, 1932, 164 Md. 146, 164 A. 220, 290 U. S. 585, 54 S. Ct. 56 (1933)
Mass.—Building Com'r of Town of Brookline v. McManus, 263 Mass. 270, 160 N. E. 887 (1928)
Phillips v. Board of Appeals of Springfield, 286 Mass. 469, 190 N. E. 601 (1934)
Minn.—Gunderson v. Anderson, 190 Minn. 245, 251 N. W. 515 (1933)
N. J.—Apter v. City of Newark, 6 N. J. Misc. 554, 142 A. 310 (1928)
Keiser v. Inhabitants of Plainfield, 10 N. J. Misc. 496, 159 A. 785 (1932)
N. Y.—Bond v. Cooke, 237 App. Div. 229, 262 N. Y. S. 199 (1932)
Lovett v. Walsh, Supreme Court, New York County, New York Law Journal, July 2, 1926, affd. 220 App. Div. 756, 222 N. Y. S. 846 (1927)
Matter of Fairchild Sons, Inc., Supreme Court, Nassau County, New York Law Journal, February 15, 1935, 246 App. Div. 555, 282 N. Y. S. 916 (1935)
Potter v. Rothschild, Supreme Court, New York County, New York Law Journal, June 30, 1927
Okl.—In re Dawson, 136 Okl. 113, 277 P. 226 (1929)
R. I.—Drabble v. Zoning Board of Review of Providence, 52 R. I. 228, 159 A. 828 (1932)
Tenn.—City of Memphis v. Qualls, 16 Tenn. A. 387, 64 S. W. (2d) 548 (1933)
Spencer-Sturla Co. v. City of Memphis, 155 Tenn. 70, 290 S. W. 608 (1927)
Tex.—King v. Guerra, 1 S. W. (2d) 373 (1927)

It is unusual to relegate undertaking establishments to industrial districts.[1]

Bakery and Confectionery Shops

From time immemorial small shops for selling baked goods and candy made on the premises have existed in business districts. Although the industrial feature is prominent, municipalities almost uniformly permit such shops in business districts. The danger is that the shop may grow to be a large factory. This is frequently sought to be prevented by a requirement that the selling shall be at retail and on the premises, or by a limitation placed upon the number of employees.

Theatres

A theatre is a business building and is usually excluded from residence districts. A moving picture house is considered to be a theatre.[2]

Newspaper Printing Offices

Strictly speaking the newspaper-making establishment is an industry and should be excluded from business districts. But because of its special needs, one of which is location in the business center, it is usually permitted in such districts. This permission was in the original building zone resolution of New York City.

Open-Air Uses

Amusement parks, fairgrounds, airports, race tracks, stadiums and other similar uses of a private nature are classified as business, but because large areas are needed, ordinances frequently allow them in residence districts on approval of the board of appeals. This board will usually impose conditions in the permit. When a ball ground is lawfully nonconforming it cannot be compelled to obtain an occupancy permit in order to continue, but if it has not charged admission fees it cannot begin to do so.[3] By that act it

[1] Matter of Fairchild Sons, Inc., Supreme Court, Nassau County, New York Law Journal, February 15, 1935, 246 App. Div. 555, 282 N. Y. S. 916 (1935)

[2] Goelet v. Moss, Supreme Court, New York County, N. Y., New York Law Journal, August 1, 1936

[3] Brenner v. Ricca, Supreme Court, Westchester County, N. Y., New York Law Journal, July 26, 1935

would create a business use. In Jacksonville, Fla., a method that cannot be approved was employed to establish a racing course for dogs. A special statute was passed for the purpose instead of adhering to the provisions of the zoning ordinance.[1]

If they are in public parks these open-air uses are allowed in residence districts. Public parks are areas devoted by law to recreation exclusively. This being the case they should not be zoned for use.

Open-air parking places are discussed under "Garages," p. 204.

Factories

A factory is a place where manufacturing is carried on—that is, where the form of articles or forces is changed. The development of zoning has produced the terms light and heavy industry. Light industry—such as the needle trades, weaving, or paper box making—often employing women, is differentiated from heavy industry—like boiler making, smelting, or iron working—which causes more noise, smoke, or fumes.

Earth-Product Operations

Zoning cannot be employed to prevent an owner taking earth products from his land.[2] But if his sand pit or quarry is in a residence district he may be prevented from treating the product in that place.

Where oil is known to underlie the surface of the land the landowner cannot be prevented from drilling on the ground that the

[1] Landis v. Valz, 117 Fla. 311, 157 S. 651 (1934)

[2] Cal.—People v. Hawley, 272 P. 1076, 207 Cal. 395, 279 P. 136 (1929)
Iowa—Anderson v. Jester, 206 Iowa 452, 221 N. W. 354 (1928)
N. J.—Lamb v. A. D. McKee, Inc., 10 N. J. Misc. 649, 160 A. 563 (1932)
N. Y.—Bartsch v. Ragonetti, 123 Misc. 903, 207 N. Y. S. 142, affd. 214 App. Div. 799, 210 N. Y. S. 825 (1925)
Cordts v. Hutton Company, 146 Misc. 10, 262 N. Y. S. 539, affd. 266 N. Y. 399, 195 N. E. 124 (1934)
Leach v. Kenyon, 146 Misc. 571, 261 N. Y. S. 676 (1933)
City of New York v. Holzman, Supreme Court, Kings County, New York Law Journal, August 7, 1924
People v. Linabury, 209 N. Y. S. 126 (1924)
Ventres v. Walsh, 121 Misc. 494, 201 N. Y. S. 226 (1923)
Ohio—Village of Terrace Park v. Errett, 12 F. (2d) 240 (1926)
R. I.—Morris v. Zoning Board of Review of Pawtucket, 52 R. I. 26, 155 A. 654 (1931)

land is in a residence district on the zoning map.[1] Although this may be stated as a general rule there is a growing tendency to recognize exceptional situations.[2]

Large wells for water, used in connection with power pumps, prevail in California. One decision declares that in a residence district a water company cannot dig large wells, but a city can do so.[3]

Sawmills

A carpenter shop with a swing saw is a sawmill.[4]

Driveways

These are sometimes treated as if they were uses of land. It is rather evident that a driveway in a residence district leading to a garage, gasoline station, or factory in an unrestricted district can be harmful.[5]

[1] Cal.—Del Fanta v. Sherman, 107 Cal. A. 746, 290 P. 1087 (1930)
Pacific Palisades Assn. v. City of Huntington Beach, 196 Cal. 211, 237 P. 538 (1925)

[2] U. S.—Gant v. Oklahoma City (Okla.), 289 U. S. 98, 53 S. Ct. 530 (1933)
Cal.—Marblehead Land Co. v. City of Los Angeles, 36 F. (2d) 242, 47 F. (2d) 528 (1931)
Mich.—City of North Muskegon v. Miller, 249 Mich. 52, 227 N. W. 743 (1929)
Okl.—American Oil & Refining Co. v. Beveridge, 58 P. (2d) 337 (1936)
Anderson-Kerr, Inc. v. Van Meter, 162 Okl. 176, 19 P. (2d) 1068 (1933)
Beveridge v. Harper & Turner Oil Trust, 168 Okl. 609, 35 P. (2d) 435 (1934)
Beveridge v. Westgate Oil Co., 171 Okl. 360, 44 P. (2d) 26 (1935)
Blevins v. Harris, 172 Okl. 90, 44 P. (2d) 112 (1935)
Courter Oil Co. v. Oklahoma City, 167 Okl. 633, 31 P. (2d) 596 (1934)
Cromwell-Franklin Oil Co. v. Oklahoma City, 14 F. Supp. 370 (1930)
Hubbard v. Oklahoma City, 58 P. (2d) 547 (1936)
K. & L. Oil Co. v. Oklahoma City, 14 F. Supp. 492 (1936)
Keaton v. Brown, 171 Okl. 38, 45 P. (2d) 109 (1935)
Morgan Petroleum Co. v. Oklahoma City, 167 Okl. 632, 31 P. (2d) 594 (1934)
Reinhart & Donovan Co. v. Refiners' Production Co., 175 Okl. 522, 53 P. (2d) 1116 (1936)
Van Meter v. H. F. Wilcox Oil & Gas Co., 170 Okl. 604, 41 P. (2d) 904 (1935)
Van Meter v. Westgate Oil Co., 168 Okl. 200, 32 P. (2d) 719 (1934)

[3] Sunny Slope Water Co. v. City of Pasadena, 1 Cal. (2d) 87, 33 P. (2d) 672 (1934)

[4] Gillespie v. Olena, 258 N. Y. 535, 180 N. E. 321 (1931)

[5] Ind.—In re White, 95 Ind. A. 579, 180 N. E. 873 (1932)
N. H.—Faulkner v. City of Keene, 85 N. H. 147, 155 A. 195 (1931)
N. Y.—Village of Great Neck Estates v. Bemak & Lehman, Inc., 223 App. Div. 853, 228 N. Y. S. 917, affd. 248 N. Y. 651, 162 N. E. 562 (1928)
Va.—Wood v. City of Richmond, 148 Va. 400, 138 S. E. 560 (1927)

Cemeteries

Cemeteries should ordinarily be allowed in residence districts.[1] It is shocking to the sensibilities of the living to bury their relatives in business or industrial districts. Modern cities and villages do not establish new cemeteries within their boundaries. Appropriate spots in unincorporated areas or in farming communities should be selected and these will usually be in residence districts on the zoning maps. A crematory has been held to be a cemetery use.[2] In New York the county board of supervisors has exclusive authority to determine the location of a cemetery.[3]

Gasoline Tanks

Gasoline tanks usually store a larger amount of gasoline than a filling station, and are often subjected to more rigorous regulation.[4]

Skating Rinks

A skating rink is not a nuisance *per se* and cannot be excluded from an amusement park which is in a proper district.[5]

Standard and Miniature Golf Courses

A miniature golf course will not be permitted under a provision for golf courses in residence districts.[6]

Standard golf courses are usually permitted in residence districts as incidental to country clubs.[7]

[1] Kan.—City of Wichita v. Schwertner, 130 Kan. 397, 286 P. 266 (1930)
Md.—Gordon v. Commissioners of Montgomery County, 164 Md. 210, 164 A. 676 (1933)
N. Y.—Town of Babylon v. Wellwood Cemetery Ass'n, Inc., Supreme Court, Suffolk County, New York Law Journal, November 25, 1935
Pa.—Fierst v. William Penn Memorial Corporation, 311 Pa. 263, 166 A. 761 (1933)

[2] Moore v. U. S. Cremation Co., 158 Misc. 621, 286 N. Y. S. 639 (1936)

[3] Town of Babylon v. Wellwood Cemetery Ass'n, Inc., Supreme Court, Suffolk County, N. Y., New York Law Journal, November 25, 1935

[4] N. Y.—Beckmann v. Talbot, 239 App. Div. 835, 264 N. Y. S. 193 (1933)
Town of Greenburgh v. Secord, Supreme Court, Westchester County, White Plains Daily Reporter, May 5, 1928
Lees v. Cohoes Motor Car Co., 122 Misc. 373, 203 N. Y. S. 65 (1924)

[5] Manos v. City of Seattle, 173 Wash. 662, 24 P. (2d) 91 (1933)

[6] Ala.—Drennen v. Mason, 222 Ala. 652, 133 S. 689 (1931)
N. Y.—Brebra Realty Corp. v. Cooper, Supreme Court, Westchester County, New York Law Journal, August 13, 1930

[7] Golf, Inc. v. District of Columbia, 62 App. D. C. 309, 67 F. (2d) 575 (1933)

Ice Making and Handling Establishments

Ordinances properly discriminate among the various methods of handling ice.[1] Stores in business districts often need to handle small quantities in their retail trade. Ice storage houses are sometimes permitted in business districts but more often are restricted to industrial districts. Ice making on a commercial scale is an industry and should be limited to industrial districts.

Junk Yards

Junk yards should be limited to industrial districts. A noted junk-yard case caused the downfall of use zoning in St. Louis before zoning was reëstablished under a state enabling act.[2]

Milk Stations

Milk bottling and distributing stations are usually excluded from business districts. It is evident that there are many varieties possible between the station handling milk in tight containers and the station where bottling is carried on. These gradations have been discussed by boards of appeals in many cases, but few cases have been carried to court.[3]

Slaughter Houses

Slaughter houses are usually excluded from all except unrestricted districts or those zoned for heavy industry.[4] Chicken slaughter houses present difficult problems in large cities where

[1] Ga.—Morris v. Lunsford, 176 Ga. 49, 167 S. E. 297 (1932)
La.—Hayes v. City of New Orleans, 154 La. 289, 97 S 446 (1923)
Md.—Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1933)
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N. Y.—Woodford v. Rubel Coal & Ice Corp., Supreme Court, Kings County, New York Law Journal, May 15, 1930
Ohio—City Ice & Fuel Co. v. Stegner, 120 Oh. St. 418, 166 N. E. 226 (1929)

[2] City of St. Louis v. Evraiff, 301 Mo. 231, 256 S. W. 489 (1923)

[3] Fourcade v. City of San Francisco, 196 Cal. 655, 238 P. 934 (1925)

[4] N. J.—Srager v. Mintz, 109 N. J. Eq. 544, 158 A. 471 (1932)
N. Y.—Benfish Const. Co. v. Department of Health, Supreme Court, Kings County, New York Law Journal, April 21, 1931
Livoti v. Connell, Supreme Court, New York County, New York Law Journal, May 22, 1931, affd. 235 App. Div. 611, 254 N. Y. S. 1082 (1932)

rabbis kill chickens according to the Mosaic law. There is constant pressure to allow this practice, in limited form, in business districts. Variances, with conditions, have sometimes been granted.

Tanneries

Tanneries are assigned to heavy industry districts.[1]

Transformer Stations

Transformer stations of public utilities come under the definition of industrial use because they change the form of the product, electricity. They do not always contain moving parts. All of them need to be in the right locations in relation to their distribution systems, and there is much to be said in favor of their being exempted from use regulations, or else provided for in the ordinance in an item of original jurisdiction of the board of appeals.[2]

Circus and Other Tents

Circus tents and other large tents for lectures, auctions, and similar purposes often offend home owners in residence districts. If they are to be permanent, they should be prevented the same as new business buildings.[3]

Poultry Markets

Markets for selling live poultry are sometimes excluded from business districts.[4]

Brick-Making Plants

A brick-making plant is usually assigned to an industrial district.[5]

[1] Mass.—La Montagne v. Kenney, 288 Mass. 363, 193 N. E. 9 (1934)
Minn.—State v. Taubert, 126 Minn. 371, 148 N. W. 281 (1914)

[2] Taylor v. Walsh, 140 Misc. 25, 248 N. Y. S. 753 (1926)

[3] Peck v. Westchester Country Club, Inc., Supreme Court, Westchester County, N. Y., New York Law Journal, August 3, 1934

[4] Greenstein v. Bigelow, 5 N. J. Misc. 124, 135 A. 661 (1927)

[5] Colby v. Board of Adjustment, 81 Colo. 344, 255 P. 443 (1927)

Signs

If a building and its use are lawful, a sign calling attention to that use is considered a customary accessory use.[1]

[1] Ill.—Illinois Life Insurance Co. v. City of Chicago, 244 Ill. A. 185 (1927)
Mass.—Town of Lexington v. Govenar, 3 N. E. (2d) 19 (1936)
N. Y.—Towers Management Corporation v. Thatcher, Supreme Court, Kings County, New York Law Journal, September 10, 1935, 246 App. Div. 835, 286 N. Y. S. 435, 271 N. Y. 94, 2 N. E. (2d) 273 (1936)

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